group has a "[s]trong community partnership[], including well-defined roles for faith- or community-based organizations." (Pet. App. 18a, JA0844)

If the Corporation chooses a group to serve as an AmeriCorps grantee, the Corporation charges that grantee with the responsibility to recruit and train a specified quota of AmeriCorps participants to serve in the program that the group administers. (Pet. App. 19a, 46a, JA0746, JA0772-74) As a practical matter, an AmeriCorps participant who wishes to participate in the Education Awards Program, and to be eligible for an Education Award, may only do so through an approved, grantee-administered program. (Pet. App. 19a-20a, JA1655-57)

II. The Religious Groups That The Corporation Has Chosen As Grantees

The Corporation has chosen through this grant process to fund certain religious organizations. According to the groups' own public statements (of which the Court can take judicial notice), the six "faith-based" grantees in the AmeriCorps Education Awards program selected by the Corporation for fiscal year 2004 all identify themselves with Christian faiths. (JA1663, Addendum to Appellate Br. of *Amicus Curiae* in Support of Affirmance) Among those religious organizations that place the largest number of AmeriCorps participants as teachers in religious schools are Notre Dame and the Catholic Network of Volunteer Service ("CNVS"). (Pet. App. 21a, JA0759)

A. Notre Dame's ACE Program

The Alliance for Catholic Education or "ACE" program is an AmeriCorps Education Awards program operated by Notre Dame, a private Catholic university located near South Bend, Indiana. (Pet. App. 24a) One of

the "pillars" of the ACE program is "spirituality." (Pet. App. 24a, JA1048-49) The ACE program includes a 12-step series of retreats designed "[t]o harness and more effectively embody and communicate the key themes related to Christ Teacher." (Pet. App. 25a, JA0475, 1053-54) During the school year, ACE participants are required to live in "intentional Christian communities" of four to seven people. (Pet. App. 25a, JA1054)

Prior to their placement in parochial schools, ACE participants must take part in a "summer program" designed to prepare them for their placements as teachers. (Pet. App. 24a, JA1052) A number of the courses that are taught during the summer program have religious content. (Pet. App. 25a, JA1069) Courses offered in the summer program have included, for example, "Becoming Educators in Faith: Catechesis in Catholic Schools" and "Teaching Religion in Catholic Schools." (Pet. App. 25a, JA0704)

Following completion of the summer program, each ACE participant is assigned to teach in a Catholic elementary or secondary school. (JA0887) Approximately 50% of ACE participants are assigned to teach religious subjects in their placements. (Pet. App. 24a, JA0889)

B. Catholic Network Of Volunteer Service

CNVS is an "umbrella" organization that is composed of more than 200 member programs, of which approximately 80% are Catholic. (Pet. App. 26a, JA1295) AmeriCorps participants affiliated with CNVS programs are placed in approximately 200 religious schools. (JA1295-96) Approximately 30% of the AmeriCorps teachers serving through CNVS-affiliated organizations teach religious subjects. (Pet. App. 26a, JA0722)

CNVS-affiliated programs identified through a search conducted by AJC in the organization's Internet recruitment directory under the heading, "Religious Education and Retreat Work" revealed many programs through which AmeriCorps Education Awards were available. Although the Corporation's governing statute precludes discriminatory selection of participants, *see* 42 U.S.C. § 12635, the descriptions for several CNVS member organizations posted in the CNVS directory required that participants in the programs be members of particular religious faiths. (Pet. App. 26a-27a) The Corporation did not discover, or take any action to remedy, these groups' policies until AJC brought the issue to its attention through litigation. *Id.*

III. Religious Instruction By AmeriCorps Participants In Their Placements

Under the Education Awards Program, hundreds of AmeriCorps participants serve in sectarian schools each year. (Pet. App. 21a, JA0888, 1296) It is undisputed that many AmeriCorps participants teach religion in sectarian elementary and secondary schools, lead the students in prayer, and engage in other religious activities with the students during the school day. (Pet. App. 33a)

For example, two AmeriCorps participants that AJC learned about in discovery – Kelly Stoltz and Jennifer B'Oris – taught in a parochial elementary school in Boston during the 2002-2003 school year. (Pet. App. 31a, JA0644-46, 1392-93, 1395)

Ms. Stoltz taught pre-kindergarten classes. She spent about 15 minutes per day in religious instruction of the students. This religious instruction was integrated throughout the school day. Ms. Stoltz also led the pre-kindergarten students in prayer in the morning before snack, at lunch, at nap-time, and dismissal. There were religious

symbols displayed in Ms. Stoltz's classroom, such as a crucifix and religious statues. As encouraged by the AmeriCorps program, a sign bearing the AmeriCorps logo was displayed at the doorway to her classroom. An AmeriCorps sign was posted by the entranceway to the school. (Pet. App. 31a-32a, JA0649, 1392-94)

Ms. B'Oris taught a class of third grade students. She conducted 30 minutes of religious instruction each day. She also led the students in prayer before school started, before lunch, and at the end of the school day. As in Ms. Stoltz's classroom, there were religious symbols displayed in Ms. B'Oris' classroom. An AmeriCorps sign was similarly posted outside Ms. B'Oris' classroom. (Pet. App. 31a-32a, JA0648-49, 1395-96)

The AmeriCorps signs posted outside these classrooms are part of the concept of "AmeriCorps Identity" – the Corporation's policy of encouraging AmeriCorps participants to identify their affiliation with the government-sponsored program. (Pet. App. 22a-24a) For example, the Corporation requests that "[a]ll Site Supervisors ... post an AmeriCorps sign or banner in their offices or facilities. It should be within the vicinity of wherever you[r] member is located, so members of your staff and service community can identify the member's participation in AmeriCorps." (Pet. App. 23a, JA0922)

The Corporation amended one of its governing regulations, effective in August of 2002, explicitly to permit AmeriCorps participants to teach religion and lead prayer during their placements so long as they do not record such religious activity on their Corporation "timesheets."[2] Under

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[2] *Compare* 45 C.F.R. § 2520.30 (2001) (Pet. App. E) *with* 45 C.F.R. § 2520.30 (2002) (Pet. App. E). These timesheets are not reviewed by the Corporation's Education Awards staff except when a site visit is

the policy memorialized in its amended regulation, the government thus attempts to suggest that it is not funding or sponsoring religious instruction by keeping "off the books" the teaching of religion by AmeriCorps members during their period of service. Nevertheless, under the Corporation's policy, both religious and secular instruction are conducted by the same AmeriCorps teachers, in the same classrooms, during the same school day – and in some cases even during the same classroom period.

IV. The Corporation's Direct Funding Of Religious Groups

The Corporation pays the religious grantees like ACE and CNVS that it picks through its discretionary grant process direct cash funding in an amount equal to $400 per year for each full-time equivalent AmeriCorps participant that they enroll. (Pet. App. 34a, JA0748) In the first four years of its grants, for example, CNVS received direct funding totaling more than $3 million, which the group placed in its general checking account. (Pet. App. 34a, JA0234, 0299, 0383, 0440, 1303-04)

The Corporation argues that this money is meant only to pay for the secular costs of administering the program, and not the religious training of the AmeriCorps teachers or other religious aspects of the programs. However, the Corporation acknowledges that it does not require its grantees to account for the use of these funds, and therefore has established no mechanism to ensure that the federal funding is not used to pay for religious training and activity. (Pet. App. 34a, JA0748) Rather, the Corporation operates under the

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conducted to the school. (Pet. App. 28a, 30a, JA1224-25) Those few site visits – conducted at only a tiny percentage of the schools each year – are announced ahead of time, so that the host sites can get their paperwork in order prior to the visits. (Pet. App. 30a, JA1215, 1359)

"expectation" that the amount of the grants will exceed the secular costs of administering the program. (Pet. App. 34a, JA0076-77, 0748)

V. Procedural History

After learning that federally funded AmeriCorps participants might be teaching religion, AJC asked the Corporation in the spring of 2001 whether this was so. At first, the Corporation responded that "the Corporation ... does not allow AmeriCorps members to teach religion." (JA0451) This position was in keeping with the Corporation's relevant governing statute and regulation at that time.

Notwithstanding the statute and regulation, AJC learned that AmeriCorps participants were teaching religion and leading their students in prayer during the school day in the sectarian schools in which they were placed. Indeed, the Corporation amended its governing regulation, effective in August of 2002, explicitly to permit AmeriCorps participants to teach religion and conduct prayer during their placements so long as that religious activity was not recorded on the participants' timesheets. After the Corporation refused voluntarily to prohibit AmeriCorps teachers from engaging in religious instruction in their placements in response to AJC's request, AJC filed its complaint with the United States District Court for the District of Columbia in October of 2002.

Following substantial written and deposition discovery, AJC filed a motion for summary judgment with the District Court in December of 2003. Both the Corporation and Intervenor Notre Dame also filed summary judgment motions. In an opinion dated July 2, 2004, the District Court set forth at length the undisputed facts that

served as a basis for its decision and fully analyzed all of the pertinent legal arguments:

First, the District Court's decision rejected the Corporation's argument that the government funding was limited only to AmeriCorps participants' secular activity and not their religious instruction. Rather, the District Court found that "[t]he line between the two has become completely blurred." (Pet. App. 14a)

Second, the District Court held that the program at issue was not governed by *Zelman* because, among other things, the government "uses highly discretionary criteria – as opposed to fixed, objective, measurable criteria – to pick and choose among potentially qualifying AmeriCorps ... grantees." (Pet. App. 43a)

Third, the District Court found unconstitutional the government's direct funding of religious groups that it had chosen as grantees, stating that "[t]he Corporation's 'expectation' that the grantees will spend the direct monetary grants on secular administrative costs – without actually requiring any segregation or accounting for the use of the grants – is not sufficient to render the grants constitutional." (Pet. App. 52a-53a) (citing *Comm. for Pub. Educ. & Rel. Liberty v. Nyquist*, 413 U.S. 756, 778 (1973))

Accordingly, the District Court granted AJC's motion for summary judgment and denied the Appellants' cross-motions. After further briefing, on August 5, 2004, the District Court entered an injunction enforcing its decision. (Pet. App. 56a) That injunction was subsequently stayed by the District Court pending appeal. The Corporation and Notre Dame both appealed the District Court's orders to the United States Court of Appeals for the District of Columbia Circuit, which reversed the District Court:

First, the Court of Appeals declined to import any significance to the "blurring" of the line between religion and secular instruction that the District Court had found. The Court of Appeals concluded instead that the relevant portion of *Ball* relied on by AJC as giving force to those concerns was no longer binding – not because it has been explicitly overruled by this Court, but because "[m]uch of the reasoning in *Ball* has been overturned." (Pet. App. 6a)

Second, the Court of Appeals held the program at issue to be one of "private choice" because AmeriCorps participants had a sufficient number of secular service positions available to them. (Pet. App. 10a) Contrary to the District Court's decision, it found irrelevant to the constitutional inquiry that the government had broad discretion to select the religious groups that recruited and trained those participants and placed them as religion teachers in sectarian schools. (Pet. App. 8a)

Third, without addressing the Supreme Court authority relied upon by the District Court, the Court of Appeals sustained the government's direct funding of religious grantees despite the lack of any government accounting or monitoring of the use of grant funds. (Pet. App. 11a-12a) Instead, the Court of Appeals reasoned that the grants were constitutional because the amount of the funds did not exceed the programs' projected secular costs. (Pet. App. 11a-12a) (citing *Comm. for Pub. Educ. & Rel. Liberty v. Regan*, 444 U.S. 646 (1980))

Following the decision, AJC filed a petition for rehearing *en banc*, which the Court of Appeals denied. By this Petition, AJC now seeks review of the Court of Appeals' decision by this Court.

REASONS FOR GRANTING THE WRIT

Summary

This Court has held that the government cannot provide sponsorship and funding to sectarian school teachers who, in addition to the secular instruction that the government supports, are teaching young students religion and leading them in prayer. *Ball*, 473 U.S. at 397. However, the Court of Appeals brushed aside *Ball* by concluding that even that portion of the decision relevant to this case had been undermined by the reasoning of subsequent cases. (Pet. App. 6a) This Court should grant the Petition to make clear that the holding of *Ball* that forbids the federal funding of sectarian school teachers who indoctrinate impressionable elementary and secondary school students in religion has never been overturned.

Instead of adhering to the viable aspects of *Ball*, the Court of Appeals adopted the government's exaggerated view of *Zelman*, 536 U.S. at 649. Unlike in *Zelman* and its antecedents, here the federal government selects a limited number of grantees through a highly discretionary grant process, using vague and ill-defined grant criteria. The Petition should be granted to determine the extent to which such programs involving substantial government discretion can be immunized from challenge as programs of "true private choice."

Finally, the Court of Appeals incorrectly concluded that the government may furnish cash funding to religious groups that recruit AmeriCorps teachers and provide them religious training, without requiring those groups to account for the use of the federal funds to ensure that they are used only for secular purposes. Permitting the government to provide direct cash aid to religious groups without any tangible restrictions on use of the aid is inconsistent with a

long line of this Court's precedent. The Court should grant this Petition and should demarcate the proper boundaries of federal funding of religious institutions.

I. This Court Should Grant The Petition To Make Clear That *Ball* Precludes The Government From Funding Sectarian School Teachers Who Teach Religion In Sectarian Elementary And Secondary Schools

In a single sentence, the Court of Appeals cast aside this Court's governing decision in *Ba.* concluding that "[m]uch of the reasoning in *Ball* has been overturned." (Pet. App. 6a) (citing *Agostini v. Felton*, 521 U.S. 203, 236 (1997)) However, the part of *Ball* relevant to this case has pointedly not been overturned. *Agostini*, 521 U.S. at 235. The Court of Appeals' conclusion thus runs directly contrary to this Court's admonition in *Agostini* that Courts of Appeal may not take on the responsibility of declaring Supreme Court precedent to have been overruled by implication.[3] This Court should grant the Petition to make clear that *Ball* continues to preclude the government from operating programs that subsidize the salaries of sectarian school teachers who engage in religious indoctrination of young elementary and secondary students – and to emphasize that the Court of Appeals had no authority to hold otherwise.

In *Ball*, this Court found two government programs to violate the Establishment Clause. Only that portion of the *Ball* opinion addressing one of these programs, the "Shared

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[3] *See Agostini*, 521 U.S. at 237 ("If a precedent of this Court has direct application in a case ... the Court of Appeals should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions") (quotation omitted). *See also Tenet v. Doe*, __ U.S. __, 125 S. Ct. 1230, 1237 (2005) (quotation omitted) (same); *State Oil v. Khan*, 522 U.S. 3, 20 (1997) ("[I]t is this Court's prerogative alone to overrule one of its precedents.").

Time" program, was subsequently overruled in the Court's 1997 opinion in *Agostini*, 521 U.S. at 235 ("[W]e must acknowledge that ... the portion of *Ball* addressing Grand Rapids' Shared Time program, [is] no longer good law."). *Ball*'s holding with respect to the other program – the "Community Education" program – remains binding precedent.

The "Community Education" program involved secular classes held at the conclusion of the regular school day in private schools, including religious schools. *Ball*, 473 U.S. at 376-77. Most of the instructors that were hired by the school district to teach the after-school classes were teachers who were otherwise employed full-time by the same private schools where the Community Education classes were held. *Id.*

The Court held the Community Education program to violate the Establishment Clause. In doing so, it explained that, in this environment, "the students would be unlikely to discern the crucial difference between the religious school classes and the 'public school' classes, even if the latter were successfully kept free of religious indoctrination." *Id.* at 391. The Court also reasoned that, even assuming that the publicly funded classes were entirely secular, this arrangement constituted "a powerful symbol of state endorsement and encouragement of the religious beliefs taught in the same class at some other time during the day." *Id.* at 392.

There was a crucial difference, noted in the separate opinion authored by Justice O'Connor, between the Shared Time program later found constitutional and the Community Education program: the fact that in the latter program, the same religious school teachers who taught the students' religious school classes were paid by the government to

conduct ostensibly secular classes. *See id.* at 399-400 (O'Connor, J., concurring in relevant part).

Like the teachers in the Community Education program (and unlike the teachers in the Shared Time program and the program upheld in *Agostini*), the AmeriCorps teachers who receive government funding and sponsorship are the very same teachers who instruct sectarian school students in religion and lead them in prayer. In fact, in this program, both religious and secular teaching take place during the school day, in the same classrooms, and even during the same classroom period. As one AmeriCorps participant testified, religious and secular instruction "are intermixed. It's hard to say I worked from 8:15 to 8:30 talking with a student about God, and then from 8:31 to 8:41 I didn't talk about God at all." (JA 1428)

As the District Court held, under these circumstances "there is a total blurring of religious and non-religious activities." (Pet. App. 49a) This "blurring" is particularly critical because many AmeriCorps participants are teaching young impressionable elementary school students, whose school days are less likely to be divided into regimented, discrete subject matter areas and who are more susceptible to state endorsement of religious beliefs, as this Court has recognized. *See Ball*, 473 U.S. at 390. This danger is heightened even further because the Corporation strongly encourages the teachers here to identify their affiliation with and sponsorship by the government program at issue in their teacher placements.

As the Court described in *Ball*, there are unique constitutional dangers present when government-sponsored teachers are placed in sectarian elementary and secondary schools, where they instruct young children during their formative years. The Court has therefore very closely scrutinized aid programs involving government-supported

teachers under the test first articulated in *Lemon* and refined in the Court's later precedent. *See Lemon*, 403 U.S. at 612; *Agostini*, 521 U.S. at 223-24.

In *Agostini*, for example, the Court only narrowly upheld a program that allowed government-funded *public school* teachers to teach entirely secular subjects on parochial school grounds. *See Agostini*, 521 U.S. at 212. There was no reason to presume, the Court held, that those public school teachers (who were not necessarily even adherents of the schools' religious denomination) would engage in religious indoctrination that might be attributable to the government. *Id.* at 226. However, the Court has never gone so far as to permit the government to subsidize the salaries of *sectarian* school teachers who actually engage in religious instruction and who share the schools' religious commitments, as is the case in this program. Indeed, the Court has struck down a salary subsidy of sectarian school teachers even when those teachers were restricted by statute from engaging in any religious instruction whatsoever. *Lemon*, 403 U.S. at 608.

Instead of paying heed to the danger that impressionable students would be exposed to government-sponsored religious indoctrination, the Court of Appeals focused exclusively on whether the *teachers* in the program had a "private choice" to engage in secular rather than religious activity. (Pet. App. 6a-8a) (citing, *inter alia*, *Zelman*, 536 U.S. at 639) However, the young elementary and secondary parochial school students who are being indoctrinated in religion are not privy to any such supposed "choice" by their teachers – and have no reason to draw any conclusion other than government approval and sponsorship of their teachers' religious message. While the Court of Appeals appears to have justified its disregard of the students' perception by concluding that an "objective observer" would understand that the government was not

sponsoring religious instruction (Pet. App. 7a-8a), even such an objective observer must take into account the context in which the religious message is delivered and the likely effect that the message would have on its intended audience. *See Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 308 (2000) (concluding that "[i]n this context the members of the listening audience must perceive the pregame message as a public expression of the views of the majority of the student body delivered with the approval of the school administration").

II. The Court Should Grant The Petition To Clarify Whether Government Grant Programs Involving Highly Discretionary Criteria Can Be Considered Programs Of "Private Choice"

The Court of Appeals gave no weight to the role of the government's discretion in selecting the programs that recruit, train and place AmeriCorps participants as teachers, stating, "[w]hy, as a matter of constitutional law, this [degree of discretion] ought to be significant is not clear." (Pet. App. 8a) The Court should grant the Petition to provide guidance as to whether government discretion in awarding grants must be considered in deciding whether a program is one of "private choice."

A. The Court Of Appeals' Decision Is Contrary To Authority From Other Federal Circuits

The Court of Appeals' failure to consider the role of government discretion in this case is at odds with the conclusion of at least one other federal Court of Appeals. In *Stark v. St. Cloud State University*, 802 F.2d 1046, 1051 (8th Cir. 1986), the court held that the placement of student-teachers in parochial schools "cannot be seen as a purely private choice of the student[-teachers]" because "[t]he

University initially selects the parochial school as a suitable student teaching site, and exercises the power of final approval over every student placement." More recently, the Court of Appeals for the First Circuit has questioned whether a program can be characterized as one of "private choice" when government discretion – rather than objective criteria – determines how the aid is distributed. *Eulitt v. Maine Dep't of Educ.*, 386 F.3d 344, 349 & n.1 (1st Cir. 2004) ("Maine's scheme provides for the approval of applications based on an individualized assessment of educational benefit, whereas the Cleveland program [at issue in *Zelman*] employed only objective criteria of financial need and residency.") (citation omitted). The Court should accordingly grant the Petition to resolve the split of authority among appellate courts resulting from the Court of Appeals' decision.

B. The Court Of Appeals' Decision Conflicts With This Court's Precedent

Consistent with the First Circuit's observation in *Eulitt* and contrary to the Court of Appeals' decision in this case, this Court's precedents concerning "private choice" have always involved situations in which the aid program was essentially based on the implementation of fixed, mechanical criteria – rather than unbridled government discretion. Thus, for example, in *Zelman*, the Court stated "[a]ny private school, whether religious or nonreligious, may participate in the program and accept program students so long as the school is located within the boundaries of a covered district and meets statewide educational standards." *Zelman*, 536 U.S. at 645 (citation omitted). *See also Locke v. Davey*, 540 U.S. 712, 715-18 (2004); *Zobrest v. Catalina Foothills Sch. Dist.*, 509 U.S. 1, 10 (1993); *Witters v. Wash. Dep't of Servs. for the Blind*, 474 U.S. 481, 488 (1986); *Mueller v. Allen*, 463 U.S. 388, 398 (1983).

Even the plurality opinion in *Mitchell* (which would have upheld the per capita payments at issue in that case as resulting from "private choice") did not go so far as to suggest that government aid to religion would be insulated from challenge if the government could pick and choose among potential beneficiaries of the government aid:

> [I]f numerous private choices, *rather than the single choice of a government*, determine the distribution of aid pursuant to neutral eligibility criteria, then a government cannot, or at least cannot easily, grant special favors that might lead to a religious establishment. Private choice also helps guarantee neutrality by mitigating the preference for pre-existing recipients that is arguably inherent in any governmental aid program, *and that could lead to a program inadvertently favoring one religion or favoring religious private schools in general over nonreligious ones.*

Mitchell v. Helms, 530 U.S. 793, 810 (2000) (plurality) (emphasis added, citations omitted). *See also id.* at 809-10 ("[I]f the government, seeking to further some legitimate secular purpose, offers aid on the same terms, without regard to religion, *to all who adequately further that purpose*, then it is fair to say that any aid going to a religious recipient only has the effect of furthering that secular purpose.") (emphasis added, citations omitted). In contrast, if the aid is channeled through only those select groups that the government chooses to fund, one cannot make such an assumption.

Nevertheless, the Court of Appeals erroneously placed the burden on AJC to show the government was intentionally discriminating in favor of religious groups. (Pet. App. 9a) That is a burden that is unprecedented in

Establishment Clause jurisprudence.[4] Even when neutral criteria are used to select beneficiaries, the Court has still been concerned about whether the beneficiaries are using government funds to indoctrinate religion. *Bowen v. Kendrick*, 487 U.S. 589, 621 (1988) (remanding the as-applied challenge for further proceedings to determine whether the religious grantees were "us[ing] materials that have an explicitly religious content or are designed to inculcate the views of a particular religious faith"). Had the neutrality of the grant criteria in *Bowen* been sufficient to immunize that program from challenge, the Court would not need to have remanded the case.

The proper Constitutional inquiry is thus not, as the Court of Appeals framed it, whether the government is purposefully favoring religion, but whether religious indoctrination is "reasonably attributable" to government action. *See Mitchell*, 530 U.S. at 809 (plurality). The degree of discretion that the government has in fashioning the slate of options among which aid recipients must choose is highly relevant to whether the aid to religion is traceable to government action.

The relevance of the government's discretion to the constitutional inquiry is illustrated by the facts in this case. Education Awards are only dispensed through participation in government-selected intermediaries – the Corporation's grantees. The Corporation selects these grantees through a subjective and discretionary grant process and then charges them with the responsibility to recruit and place AmeriCorps

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[4] As a practical matter, it would be difficult if not impossible for a party to establish such intentional discrimination. For example, the government would likely argue that agencies' "predecisional" documents explaining why particular grantees were rejected are immune from disclosure under the Freedom of Information Act. *See Nat'l Labor Rel. Bd. v. Sears, Roebuck & Co.*, 421 U.S. 132, 151-52 (1975).

participants in service positions. According to publicly available sources of which judicial notice can be taken, all of the six "faith-based" grantees in the AmeriCorps Education Awards program selected by the Corporation for fiscal year 2004 identify themselves with Christian (and mostly Catholic) faiths. (JA1663, Addendum to Appellate Br. of *Amicus Curiae* in Support of Affirmance)

The government should not be permitted to select religious groups to recruit and place AmeriCorps participants as sectarian school teachers through discretionary grants and then claim to bear no responsibility for the activities of the AmeriCorps participants who serve with the organizations. *See Santa Fe*, 530 U.S. at 307, n.21 ("[T]he Establishment Clause forbids a State to hide behind the application of formally neutral criteria and remain studiously oblivious to the effects of its actions.") (quotation omitted). The Court should grant the Petition to decide whether such a program involving discretionary grants can qualify as a program of "private choice."

III. The Court Should Grant The Petition To Ensure That Direct Cash Grants To Religious Groups Are Restricted For Secular Uses As Mandated By Established Precedent

By holding that the government could fund religious groups with cash payments based only on the government's assumption that the secular costs of administering the program would exhaust the funding, the Court of Appeals' decision conflicts with this Court's established precedent governing direct aid furnished to religious groups. The Court should grant the Petition and make clear that the Court of Appeals' novel and expansive approach to assessing the constitutionality of direct funding of religion is improper.

Special dangers arise when the government provides monetary grants directly to religious groups or institutions. *See Mitchell*, 530 U.S. at 818-19 (plurality), 855 (O'Connor, J., concurring), 890 (dissent). To avoid these dangers, the Court has repeatedly held that direct government aid to religious institutions or programs must be used exclusively for secular purposes.[5] In order to ensure that this restriction is honored, the Court has further required the government to monitor the aid to prevent its diversion to religious uses.[6]

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[5] *Mitchell*, 530 U.S. at 862 (O'Connor, J., concurring in the judgment) (upholding program where government-funded secular instructional materials and equipment are required "only [to] be used for secular, neutral and nonideological purposes") (quotations omitted); *Roemer v. Bd. of Pub. Works of Md.*, 426 U.S. 736, 751 (1976) ("Like the textbooks and bus transportation in *Allen* and *Everson*, but unlike the teachers' services in Lemon I, physical facilities were capable of being restricted to secular purposes.") (plurality); *Hunt v. McNair*, 413 U.S. 734, 736 (1973) (upholding funding of religious college facilities pursuant to a restriction providing that a funded project may not include "any facility used or to be used for sectarian instruction ....") (quotations omitted).

[6] *Agostini*, 521 U.S. at 212 (program narrowly upheld due to appropriate "safeguards" where "a publicly employed field supervisor was to attempt to make at least one unannounced visit to each teacher's classroom every month"); *Mitchell*, 530 U.S. at 862 (explaining that the Jefferson Parish Public School System conducted "annual monitoring visits to each of the nonpublic schools receiving Chapter 2 aid") (O'Connor, J. op.); *Bowen*, 487 U.S. at 615 ("Unlike some other grant programs, in which aid might be given out in one-time grants without ongoing supervision by the Government, the programs established under the authority of the AFLA can be monitored to determine whether the funds are, in effect, being used by the grantees in such a way as to advance religion."); *Roemer*, 426 U.S. at 759 (plurality) (agreeing that constitutional requirements were satisfied "by the statutory prohibition against sectarian use [of government funds], *and* by the administrative enforcement of that prohibition ....") (emphasis added); *Nyquist*, 413 U.S. at 780 ("In the absence of an effective means of guaranteeing that the state aid derived from public funds will be used exclusively for secular, neutral, and nonideological purposes, it is clear ... that direct aid in whatever form is invalid.").

The Court of Appeals abandoned these established safeguards, instead approving of the government's purely statistical justification for its funding of religion. Rather than ensuring that the government funds are used to fund separable and strictly secular aspects of the program, the Court of Appeals allowed the funding because the government expected that the grantees' secular costs would exceed the amount of the grants. Commentators have expressed concern that the Court of Appeals may thus have endorsed a dangerously broad principle, one that they term a rule of "proportional financing":

> The third, and most radical possibility is that the appellate court has implicitly endorsed a rule of proportional financing, in which public aid to religious entities does not violate the Establishment Clause as long as the government funds no more than the secular portion of the funded activity – even if the activity includes specifically religious content or practices .... [T]he proportional allocation standard poses a significant and ineradicable risk that government funds may be diverted to religious uses.

Ira C. Lupu & Robert W. Tuttle, Legal Analysis, posted on The Roundtable on Religion & Social Welfare Policy, available at http://www. Religionandsocialpolicy.org/legal/legal_update.cfm?id=34.

A comparison with the Court's decision in *Bowen* shows how far such a proportional financing rule would extend the limits of government funding of religion beyond the Court's established boundaries. *Bowen*, 487 U.S. at 621. Under the rule that the Court of Appeals appears to have embraced in this case, the religious groups that received government aid in *Bowen* could have sought to convert individuals that they were counseling to their religious

beliefs and could have spent the grant funds for religious pamphlets to aid in such proselytization. In order to sustain the government grants, the groups would only have to show that the amount of the federal funding was less than the secular costs that those groups incurred. Yet the Court remanded in *Bowen* for consideration of whether the groups in question used the government funds for religious activities, such as inculcating religious doctrine – not whether they engaged in a sufficient amount of secular activity to exhaust the government grants. *Id.* at 621 ("The District Court should also consider on remand whether in particular cases AFLA aid has been used to fund 'specifically religious activit[ies] in an otherwise substantially secular setting.'") (citing *Hunt*, 413 U.S. at 743). *See also Nyquist*, 413 U.S. at 779 n.36 ("In *Tilton* [*v. Richardson*, 403 U.S. 672 (1971)], ... the Court was concerned lest any federally financed facility be used for religious purposes at any time. It was plainly not concerned only that at least 50% of the facility, or 50% of its life, be devoted to secular activities.").

The mode of analysis adopted by the Court of Appeals also cannot be reconciled with this Court's decision in *Regan. Comm. for Pub. Educ. & Rel. Liberty v. Regan*, 444 U.S. 646 (1980). *Regan* did not involve a discretionary program of state *aid* to religious institutions – it involved reimbursement of state-mandated testing. *Regan*, 444 U.S. at 650-51. Reimbursement of the expenses imposed on all private schools by the state left the religious schools in the same position that they would be in absent any government testing requirement. Here, in contrast, the government funding is provided to select religious groups that are chosen as the recipients of government largess.

Moreover, in *Regan*, there were extensive reporting and auditing requirements. *See id.* at 659 ("Of course, under the relevant cases the outcome would likely be different were

there no effective means for insuring that the cash reimbursements would cover only secular services."). In contrast, here the government program included no mechanism to ensure that the government accurately concluded that the amount of the aid was less than the secular administrative costs of the program.

Nevertheless, rather than finding fault with the government's payment of cash funding to religious groups without any accounting or monitoring mechanism in place, the Court of Appeals improperly placed the burden of proof on AJC to show that the amount of the aid in fact exceeded the secular administrative costs of maintaining the program. (Pet. App. 12a) ("AJC marshaled no evidence to show otherwise nor did it make any allegation to this effect.") There is no support in this Court's precedent for imposing such a burden. The Court should grant the Petition to make clear that its established precedent, and not the Court of Appeals' novel rules, governs the analysis of whether direct funding of religious institutions is constitutional.

CONCLUSION

The Petition for Writ of Certiorari should be granted.

MARC D. STERN
AMERICAN JEWISH CONGRESS
Stephen Wise
Congress House
825 Third Avenue
Suite 1800
New York, NY 10022
(212) 879-4500

IRVIN B. NATHAN
Counsel of Record
DANIEL S. PARISER
DONALD R. GORDON
ARNOLD & PORTER LLP
555 Twelfth Street, N.W.
Washington, DC 20004
(202) 942-5000

Counsel for Petitioner

Dated: August 30, 2005

APPENDIX

Appendix A

APPENDICES

OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT DATED MARCH 8, 2005

United States Court of Appeals,
District of Columbia Circuit.

AMERICAN JEWISH CONGRESS, Appellee
v.
CORPORATION FOR NATIONAL AND COMMUNITY SERVICE, Appellant
UNIVERSITY OF NOTRE DAME, Appellant
No. 04-5317, 02cv01948.

Argued Jan. 14, 2005.
Decided March 8, 2005.

Before: EDWARDS, HENDERSON, and RANDOLPH, Circuit Judges.

Opinion for the Court filed by Circuit Judge RANDOLPH.

RANDOLPH, Circuit Judge.

The First Amendment provides that "Congress shall make no law respecting an establishment of religion." Laws intended to advance or inhibit religion, or having either effect, violate the Establishment Clause. *Agostini v. Felton,* 521 U.S. 203, 222-23, 117 S.Ct. 1997, 138 L.Ed.2d 391 (1997). The issue in this appeal from an order granting summary judgment in favor of the American Jewish

Appendix A

Congress ("AJC") is whether portions of the AmeriCorps Education Awards Program, a nationwide community service program operated by the Corporation for National and Community Service, have the effect of advancing religion.

The Corporation funds programs designed to "expand educational opportunity by rewarding individuals who participate in national service with an increased ability to pursue higher education or job training." 42 U.S.C. § 12501(b)(3). No financial assistance from the Corporation may be used "to provide religious instruction, conduct worship services, or engage in any form of proselytization." 42 U.S.C. § 12634(a). Those running an approved program may not discriminate on the basis of religion in selecting program participants. 42 U.S.C. § § 12634(a), 12635(c)(1).

The Corporation created the AmeriCorps Education Awards Program "to expand opportunities for individuals to serve as AmeriCorps Members and earn educational benefits, broaden the network of national service programs and strategies, and increase the number of communities joining with AmeriCorps to better meet their education, public safety, environmental, and other human needs." 61 Fed. Reg. 46,628 (Sept. 4, 1996). An organization (such as a local government or a non-profit organization) proposing to sponsor a national service program must send an application to the Corporation. Proposed service programs must "address unmet human, educational, environmental, or public safety needs and produce a direct benefit for the community in which the projects are performed." 42 U.S.C. § 12582(b)(4). If the Corporation approves the application, the sponsoring organization may recruit individuals to fill its approved national service positions.

Appendix A

Individuals wishing to receive an Education Award perform community service in a program sponsored by an organization approved by the Corporation. The Corporation offers $4,725 in financial aid to those individuals if they complete at least 1700 hours of service in an approved position. The individuals may use the award for education-related expenses, such as graduate school tuition and the repayment of student loans. 42 U.S.C. § 12604(a).

This case involves only individuals who fulfill their service requirement as teachers in religious schools. The University of Notre Dame, a party to this case, sponsors an approved AmeriCorps program that trains individual AmeriCorps participants and places them in needy Catholic schools, where they teach a variety of subjects, including science, mathematics, foreign languages, English, and religion. Brief of Appellant Notre Dame at 2. AJC thinks that the AmeriCorps Education Awards Program violates the Establishment Clause because individuals, such as those at Notre Dame, who are fulfilling their service requirement by teaching secular subjects in religious schools, also may teach religion courses.

AJC objects to another aspect of the AmeriCorps Education Awards Program. In addition to providing training to individual participants, organizations incur a variety of other responsibilities in sponsoring an AmeriCorps national service program. To help defray the expense of training participants and other administrative costs, the Corporation provides grants in the amount of $400 per AmeriCorps participant to all organizations that sponsor participants – religious and non-religious alike. AJC believes the $400 grants to religiously-affiliated

organizations violate the Establishment Clause.

The district court granted AJC's motion for summary judgment and denied the cross motions of the Corporation and Notre Dame. *Am. Jewish Cong. v. Corp. for Nat'l & Community Serv.*, 323 F.Supp.2d 44 (D.D.C. 2004) ("*AJC*"). The court found that the practice of permitting individual participants to teach religion in addition to secular subjects and the $400 cash grants to sponsoring organizations result "in impermissible government indoctrination in violation of the establishment clause of the First Amendment." *Id.* at 45-46. Concluding that prevailing Establishment Clause precedent permits both portions of the AmeriCorps program, we reverse.

I.

While claiming to have standing to bring this suit because of its status as a taxpayer, Brief of Appellee at 62, AJC describes itself as "a non-profit organization," *id.* at iii, which makes one wonder whether it pays any federal taxes. No matter. Even if it does not, it is fair to assume that AJC's members do. *Meek v. Pittenger*, 421 U.S. 349, 356 n. 5, 95 S.Ct. 1753, 44 L.Ed.2d 217 (1975). Notre Dame questions AJC's standing, not on this basis, but on the ground that it has not brought itself within the exception to the general rule that taxpayers do not have standing to challenge the manner in which the government spends its tax revenue. *Frothingham v. Mellon*, 262 U.S. 447, 486-87, 43 S.Ct. 597, 67 L.Ed. 1078 (1923). The exception is for taxpayer suits claiming that Congress exercised its Article I, § 8, taxing and spending power in violation of the Establishment Clause. *Flast v. Cohen*, 392 U.S. 83, 102, 88 S.Ct. 1942, 20 L.Ed.2d 947 (1968).

Appendix A

Whatever doubt there might have been before *Bowen v. Kendrick,* 487 U.S. 589, 108 S.Ct. 2562, 101 L.Ed.2d 520 (1988), it is now clear that the exception includes more than just taxpayer suits, based on the Establishment Clause, attacking taxing-and-spending statutes on their face. Also within the exception are taxpayer actions claiming a violation of that constitutional provision because of the manner in which the Executive Branch is administering the statute. *Id.* at 618-20, 108 S.Ct. 2562. A "claim that funds appropriated by Congress are being used improperly by individual grantees" is no less "a challenge to congressional taxing and spending power simply because the funding authorized by Congress has flowed through and been administered by" an executive official. *Id.* at 619, 108 S.Ct. 2562.

Notre Dame thinks this case is distinguishable from *Bowen* because AJC alleged that some, but not all, of the Corporation's actions violated not only the Establishment Clause, but also the National Community Service Act and the regulations thereunder. *See In re United States Catholic Conference,* 885 F.2d 1020 (2d Cir.1989). The distinction cannot be sustained. Despite a suggestion in its complaint, AJC has made clear that it relies solely on the Establishment Clause. Brief of Appellee at 63. No argument it has made to us rests on a statutory violation; all are aimed at the constitutionality of the Corporation's administration of the AmeriCorps program and the manner in which it allocates funds. Those arguments persuaded the district court and framed its decision. As the case now stands, it therefore fits comfortably within the rationale of *Bowen:* "The [National Community Service Act] is at heart a program of disbursement of funds pursuant to Congress' taxing and spending power, and [AJC] calls into question how the funds

authorized by Congress are being disbursed pursuant to the [Act's] statutory mandate." 487 U.S. at 619-20, 108 S.Ct. 2562. It follows that there is "a sufficient nexus between the taxpayer's standing as a taxpayer and the congressional exercise of taxing and spending power, notwithstanding the role the [Corporation] plays in administering the statute." *Id.* at 620, 108 S.Ct. 2562.

II.

AJC's principal complaint is that individuals, while teaching secular subjects at religious schools under the AmeriCorps program and receiving credit toward an Educational Award, may also teach religious subjects. *See* Compl. ¶ ¶ 4, 63-66. Under *School District of City of Grand Rapids v. Ball*, 473 U.S. 373, 105 S.Ct. 3216, 87 L.Ed.2d 267 (1985), according to AJC, if an AmeriCorps participant decides to teach religion, the decision is attributable to the government. *Ball* struck down two school district programs – a "Shared Time" program and a "Community Education" program. AJC focuses on the "Community Education" program in which the school district hired religious school teachers to teach secular classes in after-school programs in religious schools. The Supreme Court held that this program violated the Establishment Clause because it created a "symbolic union" between government and religion; "the students would be unlikely to discern the crucial difference between the religious school classes and the 'public school' classes, even if the latter were successfully kept free of religious indoctrination." *Id.* at 391-92, 105 S.Ct. 3216.

Much of the reasoning in *Ball* has been overturned. *See Agostini v. Felton*, 521 U.S. 203, 236, 117 S.Ct. 1997, 138 L.Ed.2d 391 (1997). We believe the Supreme Court's more recent decisions upholding programs of true private

choice, particularly *Zelman v. Simmons-Harris*, 536 U.S. 639, 649, 122 S.Ct. 2460, 153 L.Ed.2d 604 (2002), control this case. *See also Zobrest v. Catalina Foothills School Dist.*, 509 U.S. 1, 113 S.Ct. 2462, 125 L.Ed.2d 1 (1993); *Witters v. Washington Dep't of Servs. for Blind*, 474 U.S. 481, 106 S.Ct. 748, 88 L.Ed.2d 846 (1986); *Mueller v. Allen*, 463 U.S. 388, 103 S.Ct. 3062, 77 L.Ed.2d 721 (1983). When a government program is neutral toward religion and "provides assistance directly to a broad class of citizens who, in turn, direct government aid to religious schools wholly as a result of their own genuine and independent private choice," the Establishment Clause is not violated. *Zelman*, 536 U.S. at 652, 122 S.Ct. 2460. In that situation, no "objective observer familiar with the full history and context" of the program would believe that the aid flowing to the religious institution carries with it "the *imprimatur* of government endorsement." *Id.* at 655, 122 S.Ct. 2460.

The AmeriCorps participants and the grantees are, and must be, chosen without regard to religion. The Education Awards are available to a broad class of citizens. Any citizen at least 17 years old who holds a high school diploma or its equivalent and is selected to fill a national service position may qualify. 42 U.S.C. § 12591. Individual participants who elect to teach religion in addition to secular subjects do so only as a result of "their own genuine and independent private choice." The AmeriCorps program creates no incentives for participants to teach religion; they may count only the time they spend engaged in non-religious activities toward their service hours requirement. And if they do teach religious subjects, they are prohibited from wearing the AmeriCorps logo when they are doing so. In this situation, no reasonable person, "knowing all the circumstances," *Sao Paulo State of*

Federative Republic of Brazil v. Am. Tobacco Co., 535 U.S. 229, 232, 122 S.Ct. 1290, 152 L.Ed.2d 346 (2002), would believe that a participant's choice to teach a religion course had – in *Zelman*'s words – "the *imprimatur* of government endorsement." 536 U.S. at 655, 122 S.Ct. 2460.

AJC sees two reasons why the AmeriCorps program should not be considered a program of private choice. The first is that the AmeriCorps program is not neutral. The district court agreed, in part because an Internet search had revealed that three grantees were requiring AmeriCorps participants to "be of a particular faith." *AJC*, 323 F.Supp.2d at 60. These grantees were violating the governing statute and regulations, 42 U.S.C. § 12635(c); 45 C.F.R. § 2540.210; the Corporation took corrective action when it discovered their postings; and before the district court rendered its decision, they had lifted the restriction. *AJC*, 323 F.Supp.2d at 58 n. 8; Brief of Appellant National Corporation at 35.

The district court also thought neutrality was missing because the Corporation uses "highly discretionary criteria" to choose AmeriCorps grantees. *AJC*, 323 F.Supp.2d at 60. AJC strikes much the same note. Why, as a matter of constitutional law, this ought to be significant is not clear. The Supreme Court has not treated discretionary distribution of government funds as lacking in neutrality. In the program upheld in *Bowen v. Kendrick* – the Adolescent Family Life Act – the Secretary of Health and Human Services awarded grants based, in part, on what can only be viewed as subjective determinations. *See* 42 U.S.C. § § 300z-1(3), 300z-2(a) (1982); *see also Bowen*, 487 U.S. at 597, 108 S.Ct. 2562 (noting that the Secretary awarded 141 grants from a pool of more than 1000 applications). We are aware

of nothing in the law requiring that government aid, to pass muster under the Establishment Clause, must be handed out according to objective criteria only. All the law requires is that the government distribute funds in a manner that is neutral with respect to religion. *See Zelman,* 536 U.S. at 652, 122 S.Ct. 2460; *Agostini,* 521 U.S. at 230-31, 117 S.Ct. 1997. Perhaps discretionary criteria, in some circumstances, might serve as a pretext for the government to "grant special favors that might lead to a religious establishment." *Mitchell v. Helms,* 530 U.S. 793, 810, 120 S.Ct. 2530, 147 L.Ed.2d 660 (2000) (plurality). But AJC did not allege that the Corporation had used its discretionary authority to favor religious organizations, and it conceded at oral argument that there was no evidentiary support for such an allegation. We conclude, therefore, that the program is neutral.

AJC's other argument is that a participant's decision to perform his national service obligation in a religious school is not "a genuine and independent private choice." *Zelman,* 536 U.S. at 652, 122 S.Ct. 2460. "Eligibility for an AmeriCorps award is established," AJC argues, "only through participation in a limited number of the government's hand-picked, pre-selected programs." Brief of Appellee at 50. The relevant question is whether participants seeking to earn an Educational Award possess a genuine independent choice between religious and non-religious organizations in which to perform their national service. Of course the number of such opportunities is, as AJC puts it, "limited." It could hardly be unlimited. The important points are (1) that there are numerous AmeriCorps teaching positions in public and private secular schools; and (2) that there is no evidence of any participant who wanted to teach in a secular school, but was impermissibly channeled to a religious school. A program may be one of "true private

choice" even when more religious than non-religious choices are available. In *Zelman*, 82 percent of the eligible private schools participating in the voucher program were religious schools and 96 percent of the students who took advantage of vouchers attended religious schools. 536 U.S. at 655-58, 122 S.Ct. 2460. Here, only 328 of the 1608 schools employing AmeriCorps participants as teachers in 2001 were religious schools. When enough non-religious options exist, those participants who choose to teach in religious schools do so only as a result of their own genuine and private choice.

AJC also faulted the Corporation for failing to police its prohibition against a participant's counting time spent teaching religion courses toward the service hours requirement. In *Mitchell v. Helms*, four Justices concluded that neutrality is the touchstone of Establishment Clause inquiries in government aid cases, and that when eligibility for aid is determined neutrally, "any use of that aid to indoctrinate cannot be attributed to the government and is thus not of constitutional concern." 530 U.S. at 820, 120 S.Ct. 2530. The two concurring Justices in *Mitchell* concluded that *de minimis* diversion of aid tends to show that a program's safeguards are, in fact, working. *Id.* at 865-66, 120 S.Ct. 2530 (O'Connor, J., concurring in judgment). In the district court, AJC presented evidence suggesting that, since 1999, four AmeriCorps participants may have counted time spent teaching religion toward their service hour requirement. *See* AJC Statement of Undisputed Facts ¶ ¶ 92-126. The Corporation disputed the evidence. *AJC*, 323 F.Supp.2d at 55. Even if we credited AJC's version, it proves nothing of significance. During the same period, one sponsoring organization alone – the Catholic Network of Volunteer Service – placed 492 AmeriCorps participants as

teachers in religious schools. AJC Statement of Undisputed Facts ¶ 80. AJC therefore failed to substantiate its claim that the present monitoring of participants' timekeeping is so ineffective, and the violations so pervasive, that the AmeriCorps program must be seen as one in which the government is giving participants Education Awards for hours they spend teaching religion.

III.

This leaves the question of the $400 program management grants to organizations operating service programs. The $400 grants reimburse grantees for a portion of the costs they incur when complying with various AmeriCorps requirements. The Supreme Court upheld a similar system in *Committee for Public Education & Religious Liberty v. Regan*, 444 U.S. 646, 657-58, 100 S.Ct. 840, 63 L.Ed.2d 94 (1980), and rejected the idea that the Establishment Clause required it to invalidate "reimbursements simply because they involve payments in cash." The program in *Regan* provided "direct cash reimbursement" to religious and secular nonpublic schools for performing various testing and reporting services mandated by state law. *Id.* at 657, 100 S.Ct. 840. Here, detailed AmeriCorps guidelines require, among other things, that grantees train participants, provide them with adequate supervision by qualified supervisors, keep various records, and make regular reports to the Corporation. The $400 is meant to defray some of the costs.

AJC focuses on the lack of auditing or accounting of the AmeriCorps grants. Brief of Appellee at 58-59. The program in *Regan* included extensive auditing to verify that the schools did not receive public funds in excess of the expenditures incurred as part of the testing. 444 U.S. at 650

n. 3, 659-60, 100 S.Ct. 840. Here audits would be senseless. The evidence showed that $400 is much less than the actual administrative costs grantees incur per participant. In Notre Dame's program, for instance, the $400 grants cover only about eight percent of the salaries of those who train the AmeriCorps participants to teach in elementary schools. AJC marshaled no evidence to show otherwise nor did it make any allegation to this effect.

Regan therefore controls this aspect of the case. The government does not promote religion in violation of the Establishment Clause when it reimburses all grantees, religious and secular alike, for a portion of the costs they incur in complying with the requirements of the AmeriCorps program.

* * * * * *

For the reasons stated, the district court's judgment is

Reversed.

Appendix B

OPINION AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA DATED JULY 2, 2004

United States District Court,
District of Columbia.
AMERICAN JEWISH CONGRESS, Plaintiff,
v.
CORPORATION FOR NATIONAL AND COMMUNITY SERVICE, Defendant,
University of Notre Dame, Defendant-Intervenor.
No. CIV.A. 02-1948(GK).

July 2, 2004.

MEMORANDUM OPINION

Kessler, District Judge.

Plaintiff, the American Jewish Congress, brings this action against the Corporation for National and Community Service ("Corporation"). The University of Notre Dame ("Notre Dame") is a Defendant-Intervenor. This matter is now before the Court on three Motions for Summary Judgment filed by Plaintiff, the Corporation, and Notre Dame. Upon consideration of the Motions, Oppositions, Replies, the June 2, 2004 Motions Hearing, and the entire record herein, and for the reasons set forth below, Plaintiff's Motion is **granted**, the Corporation's Motion is **denied**, and Notre Dame's Motion is **denied**.

It is clear from the record in the instant case that the

Appendix B

AmeriCorps Education Awards Program ("EAP") being challenged by Plaintiff results in impermissible government indoctrination in violation of the establishment clause of the First Amendment.

First, it is undisputed that the AmeriCorps EAP offers program participants a national service education award of $4,725 to work in religious schools where they teach religion to their students throughout the school day, lead their students in prayer multiple times a day, and attend Mass with their students.

The Corporation defends this practice by arguing that the religious instruction undertaken by AmeriCorps participants during the school day is separate from their AmeriCorps service because the time they spend engaging in religious activity is not recorded on the timesheets they submit to justify their $4,725 award. In particular, the Corporation claims that its timekeeping policies ensure that the AmeriCorps participants do not receive public funding for the time they spend in religious activity.

However, the record discloses that the Corporation's monitoring efforts are totally inadequate to ensure that its timekeeping policies are followed. Moreover, even if the Court assumes that the Corporation accurately estimates the time AmeriCorps participants spend on religious versus non-religious activities, it is impossible to clearly distinguish between the two roles the AmeriCorps participants supposedly play. The line between the two has become completely blurred.

Second, it is undisputed that the Corporation does not require faith-based AmeriCorps EAP grantees to account for

the actual use of the $400 grants paid for every full-time participant. The Corporation claims that the secular administrative costs of the AmeriCorps EAP are "expected" to exceed the amount of the grant. However, the Corporation's "expectation" that the grantees will spend the direct monetary grants on secular administrative costs – without actually requiring any segregation or accounting for the use of the grants – is not sufficient to render the grants constitutional.

For these reasons, the Court concludes that such direct government involvement with religion "crosses the vague but palpable line between permissible and impermissible government action under the First Amendment." *DeStefano v. Emergency Hous. Group, Inc.*, 247 F.3d 397, 416 (2d Cir. 2001).

I. Background[1]

A. The Corporation and Its AmeriCorps Education Awards Program

The Corporation administers the National and Community Service Act ("Act"), 42 U.S.C. § 12501, *et seq.* *See* 42 U.S.C. § 12651. The purpose of the Act is to "meet the unmet human, educational, environmental, and public safety needs of the United States." *Id.*, § 12501(b)(1). The Corporation's "mission" "is to engage Americans of all ages and backgrounds in community-based service" by, among other things, "provid[ing] educational opportunity for those who make a substantial commitment to service." 45 C.F.R.

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[1] Unless otherwise indicated, all facts set forth herein are taken from the undisputed facts presented in the parties' briefs.

§ 2510.10. Corporation funds may not be used "to provide religious instruction, conduct worship services, or engage in any form of proselytization." 42 U.S.C. § 12634(a).

The Corporation funds a wide variety of programs in furtherance of its mission. These programs are designed to "expand educational opportunity by rewarding individuals who participate in national service with an increased ability to pursue higher education or job training...." 42 U.S.C. § 12501(b)(3). One such program is the AmeriCorps EAP. In order to "attract participants and encourage service," Def.'s Statement of Facts, ¶ 2, the Corporation offers AmeriCorps EAP participants a full-time national service education award for completing a term of at least 1700 hours of service during a nine- to twelve-month period, in a national service position pre-approved by the Corporation.[2] *See* 42 U.S.C. § § 12593(b)(1), 12602(a)(1), (b).

The AmeriCorps EAP, like most of the Corporation's programs, is administered through grantees such as state and local governments, Indian tribes, and non-profit organizations, including both secular and faith-based organizations. *See* 42 U.S.C. § § 12592(a), 12653. The Corporation has offered two pieces of evidence to describe the process it uses to evaluate grantee applications. This evidence presents two very different pictures of what factors the Corporation relies on in making grantee decisions.

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[2] The current amount of the education award is $4,725. *See* 45 C.F.R. § 2527.10(a). The education award may be used to pay principal or interest on a student loan, to pay college expenses, or to pay expenses of an approved school-to-work program. *See* 42 U.S.C. § 12604(a). The Corporation also pays interest that accrues on a participant's qualifying student loans during his or her term of service. *See* 45 C.F.R. § 2529.10.

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According to Hank Oltmann, the Corporation's Senior Program Officer and the Director of the AmeriCorps EAP, the Corporation assesses, among other things, "the extent to which the applicant identifies a compelling need and describes how that need was identified." Oltmann Decl., ¶ 15. To satisfy this requirement, applicants "include data such as position vacancy rates among social service providers, measures of academic underachievement, crime rates, health indicators, and socioeconomic indicators such as regional unemployment rates or the percentage of students qualifying for subsidized school lunches." *Id.* Oltmann also explains that "[o]ne of the Corporation's primary criteria in considering applications is 'Budget/Cost Effectiveness.' Each application must describe how the proposed program will be funded, including the use of non-federal sources to support program design." *Id.*, at ¶ 17.

The 2004 AmeriCorps Guidelines, which are far more specific and rigid, include a section titled "Review Process and Selection Criteria."[3] *See* Second Oltmann Decl., Ex. B, at 41. According to the 2004 Guidelines, "Program Design" constitutes 60 percent of the selection criteria; "Organizational Capacity" ("[a]bility to provide sound programmatic and fiscal oversight;" "[s]ound track record of accomplishment as an organization;" "[w]ell-defined roles for staff and administrators;" and "[w]ell-designed plan or systems for self-assessment, evaluation, and continuous improvement") constitutes 25 percent; and "Budget/Cost Effectiveness" ("[c]ommitment of applicant organization or host agency to securing resources, i.e., non-federal support

[3] Each year, the Corporation disseminates AmeriCorps Guidelines to all grantees.

for program implementation or sustainability;" "[a]dequate budget to support program design;" and "[c]ost-effective within program guidelines") constitutes 15 percent. *Id.*, at 41-42.

"Program Design" includes 3 categories: (1) "Needs and Service Activities" ("[w]ell-documented compelling community need;" "[w]ell-designed activities with appropriate performance measures;" "[w]ell-defined roles for participants that lead to measurable outcomes or impact;" "[p]revious history of accomplishments in the proposed activity areas;" "[e]ffective involvement of target community in planning and implementation;" and "[a]bility to provide or secure effective technical assistance"), *id.*, at 41; (2) "Member Development" ("[e]ffective plans for recruiting, developing, training, supervising, and recognizing participants;" "[w]ell-designed activities that promote an ethic of service and civic responsibility;" and "[w]ell-designed plan to engage participants in high-quality service learning as defined by the Corporation"), *id.*; and (3) "Strengthening Communities" ("[d]eveloping community resources, including recruiting and managing volunteers, with appropriate performance measures;" and "[s]trong community partnerships, including well-defined roles for faith- or community-based organizations;" "[p]otential for sustainability;" "[e]nhanced capacity building of organizations and institutions;" and "[b]ring together people of different backgrounds"). *Id.*

In fiscal years 1999, 2000, and 2001, the Corporation received a total of 153 grant applications, of which 134 were approved. Def.'s Statement of Facts, ¶ 18. In fiscal year 2002, the Corporation received 29 grant applications, of

which 20 were approved.[4] *Id.*, ¶ 19. Thus far in fiscal year 2004, there are 34 AmeriCorps EAP grantees. *See* Fifth Olmann Decl., ¶ 3.

Grantees are responsible for recruiting and selecting AmeriCorps EAP participants for their individual programs. *See* Second Oltmann Decl., Ex. B, at 16. *See also* 45 C.F.R. 2522.210. The Corporation has developed and implemented an on-line recruitment system to assist the grantees with this process. *See* Second Oltmann Decl., Ex. B, at 16. This on-line system includes a description of the Corporation's various programs and a list/description of the grantees in each of those programs. It also includes a search engine that allows prospective participants to locate programs based on the service area they are interested in (education, health, homelessness, etc.), geographic location, work schedule, and program type (AmeriCorps*VISTA, EAP, etc.). The Corporation also makes the same information available by telephone. *See* Oltmann Decl., ¶ 6.

At oral argument, the Corporation stressed that an AmeriCorps participant may earn an education award without participating in a grantee program that it has pre-approved. While the Corporation cites to 42 U.S.C. § 12573[5] in support of this claim, that section does not

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[4] Two grantee applicants withdrew their application prior to decision. Def.'s Statement of Facts, ¶ 19.

[5] 42 U.S.C. § 12573 states, in full,

> The Corporation may approve of any of the following service positions as an *approved* national service position that includes the national service educational award

appear to allow participation in any but pre-approved programs. In any case, it is clear from the Corporation's representations at oral argument that, regardless of what the statute permits, an AmeriCorps participant must, as a matter of Corporation policy, serve in a grantee program that the Corporation has pre-approved in order to earn an education award.

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described in division D of this subchapter as one of the benefits to be provided for successful service in the position:

(1) A position for a participant in a national service program described in section 12572(a) of this title that receives assistance under subsection (a) or (b) or section 12571 of this title.

(2) A position for a participant in a program that-

(A) is carried out by a State, a subdivision of a State, an Indian tribe, a public or private nonprofit organization, an institution of higher education, or a Federal agency; and

(B) would be eligible to receive assistance under section 12571(a) of this title, based on criteria established by the Corporation, but has not applied for such assistance.

(3) A position involving service as a VISTA volunteer under title I of the Domestic Volunteer Service Act of 1973 (42 U.S.C. 4951 *et seq.*).

(4) A position facilitating service-learning in a program described in section 12572(a)(3) of this title that is eligible for assistance under part I of division B of this subchapter.

(5) A position for a participant in the Civilian Community Corps under division E of this subchapter.

(6) A position involving service as a crew leader in a youth corps program or a similar position supporting a national service program that receives an approved national service position.

(7) Such other national service positions as the Corporation considers to be appropriate.

42 U.S.C. § 12573 (emphasis added).

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The only federal funds disbursed in the AmeriCorps EAP are the post-service education awards of $4,725 offered to the individual AmeriCorps participants and the $400 monetary grant provided directly to AmeriCorps EAP grantees for every full-time AmeriCorps participant that they enroll.

B. Placement of AmeriCorps Participants as Teachers in the Religious Schools of Faith-Based AmeriCorps EAP Grantees

In fiscal year 2001, 565 AmeriCorps participants were placed as teachers in 328 religious schools which were EAP grantees. *Id.*, ¶ ¶ 66-67. The University of Notre Dame (which maintains a program called the Alliance for Catholic Education ("ACE") and the Catholic Network of Volunteer Service ("CNVS")) are among those faith-based AmeriCorps EAP grantees that place the largest number of AmeriCorps participants as teachers in religious schools.[6]

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[6] While Plaintiff named the Nebraska Volunteer Service Commission ("Nebraska Program") as an "AmeriCorps grantee[ ] at issue in this action" in its Complaint, it did not refer to that program in its briefs or at oral argument except to "reserve the right to seek further discovery of other grantees that place religion teachers in sectarian schools, including the Nebraska Teachers Corps, prior to any trial of this matter." Pls.' Opp'n, at 8, n. 10.

According to the Corporation, of the 34 grantees currently in the AmeriCorps EAP, "the following are faith-based organizations that receive grants directly from the Corporation: (1) University of Notre Dame; (2) Catholic Network of Volunteer Service; (3) Mt. Mary College; (4) Camphill Association of North America; (5) University of San Francisco; and (6) L'Arche USA. In addition, one faith-based organization, Brigham Young University, is a subgrantee of the Utah State Commission on Volunteers." Fifth Oltmann Decl., ¶ 3.

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Pursuant to the Corporation's governing regulations concerning prohibited activities, "[w]hile charging time to the AmeriCorps program, accumulating service or training hours, or otherwise performing activities supported by the AmeriCorps program or the Corporation, ... [AmeriCorps participants] may not engage in ... religious instruction, conducting worship services, providing instruction as part of a program that includes mandatory religious instruction or worship, ... or ... any form of religious proselytization." 45 C.F.R. § 2520.30(a)(7).

This regulation also states that "[i]ndividuals may exercise their rights as private citizens and may participate in [prohibited] activities on their own initiative, on non-AmeriCorps time, and using non-Corporation funds. The AmeriCorps logo should not be worn while doing do." *Id.*, § 2520.30(b). The Corporation construes this regulation to permit AmeriCorps participants to teach religion throughout the school day in their placements at religious schools so long as they do not count the hours they spend engaging in such religious activity toward their 1700-hour AmeriCorps minimum service commitment.

The Corporation encourages AmeriCorps participants placed as teachers in religious schools, and the religious schools in which they are placed, to publicize their affiliation with AmeriCorps. Pl.'s Statement of Facts, ¶ ¶ 70, 73. Ms. Kerry Galea, the Corporation's Site Visit Coordinator, testified that sites are "strongly encouraged to identify with AmeriCorps." Galea Decl., ¶ 31. It is the Corporation's "expectation" that its "Education Awards Programs and members take specific action to create an identity that includes AmeriCorps symbols and networks." Pl.'s Ex. A-2, at C 3347.

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The concept of "AmeriCorps Identity," i.e., "the extent to which the provision of AmeriCorps funding is outwardly evident at the site," is one of the specific items that Corporation personnel look for when they conduct site visits at religious schools. Oltmann Decl., ¶ 52. They are also asked to inquire whether the program in question "identif[ies] itself, and ... the members identify themselves, with AmeriCorps, through use of signs, T-shirts, sweatshirts, banners, logos that incorporate the A*C logo." Pl.'s Ex. A-2, at C 3347.

The Corporation requests that "site supervisors" post "an AmeriCorps sign or banner" at the sites where AmeriCorps participants are placed.[7] Specifically, the Corporation requests that sites place these displays "within the vicinity of wherever you[r] member is located, so members of your staff and service community can identify the member's participation in AmeriCorps." Pl.'s Statement of Facts, ¶ ¶ 75-76. The Corporation also enables grantees to purchase clothing and other items bearing the AmeriCorps logo, including signs, T-shirts, buttons, and sweatshirts. *Id.*, ¶ 78. The aggregated budgeted amount for such items in the first four years of CNVS' grant from the Corporation was $180,326.75. *Id.*, ¶ 81.

According to a 2002 Corporation site visit report on a CNVS program, there were AmeriCorps signs in each of the classrooms and at the entrances to the religious schools where AmeriCorps participants were placed. *Id.*, ¶ 86. At another CNVS school, the AmeriCorps participants were

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[7] The typical AmeriCorp sign is a gray, 9" x 12" sign with the letter "A" in the middle. Def.'s Opp'n to Pl.'s Statement of Facts, ¶ 75.

introduced to students and staff as AmeriCorps participants. *Id.*

According to the Corporation, AmeriCorps participants placed as teachers in religious schools are expected to wear the same professional attire as other school personnel. In particular, they are instructed not to wear any AmeriCorps gear, such as a T-shirt or cap, at any time while teaching religion or attending any religious function in a school. Def.'s Opp'n to Pl.'s Statement of Facts, ¶ 90.

1. The University of Notre Dame's Alliance for Catholic Education Program

The Alliance for Catholic Education ("ACE") program is an AmeriCorps EAP operated by the University of Notre Dame, a private Catholic University located in South Bend, Indiana. According to Dr. John J. Staud, ACE's Administrative Director, ACE had 163 participants during the 2002-2003 school year, approximately 50 percent of whom served as teachers in primary and secondary schools and taught religious subjects. Staud Decl., ¶¶ 10, 15.

One of the "pillars" of the ACE Program is "spirituality." The mission of the ACE teachers is ultimately connected with the larger evangelizing mission of the Catholic Church. Pl.'s Statement of Facts, ¶ 37.

The ACE program includes a "summer program" designed to prepare ACE participants for their placements as teachers. During this summer program, ACE offers prayer services – specifically Catholic Mass – four times a week. At the beginning of this summer program, a retreat is held. Prayer experiences, including Masses and morning prayer,

are offered at the retreat. A series of additional retreats are held during the ACE program as part of a "12-step program" designed "[t]o harness and more effectively embody and communicate the key themes related to Christ Teacher." *Id.*, ¶¶ 46-48.

Some of the courses that are taught during the summer program have religious content, and some of these courses are mandatory for ACE AmeriCorps teachers. One such mandatory class, titled the "Integrative Seminar," includes a lecture on "becoming educators in faith, leading others in prayer and forming prayerful communities in Catholic schools." *Id.*, ¶ 51. The Summer 2001 course syllabus for this class included such topics as "To Teach as Jesus Did: The Catholic Educator's Call to be the Love of God on Earth" and "Becoming Educators in Faith: Catechesis in Catholic Schools." *Id.* Another mandatory class is EDU 502, an introduction to teaching. According to the syllabus from one year of that class, "[i]t is absolutely essential that members of ACE have some familiarity with the Catechism of the Catholic Church." *Id.*, ¶ 52.

All ACE teachers live in "intentional Christian communities" of 4 to 7 people which are meant to foster Christian beliefs and values. Members of these communities are invited to pray together. When staff members from ACE conduct site visits to these communities, they look for the extent to which the members engage in communal prayer. *Id.*, ¶ 54-56.

ACE has a series of "new teacher performance indicators" that are applied to measure the performance of the teachers in religious schools after the summer program ends. Among the performance indicators are whether the

ACE teacher "provides a variety of prayer experiences" and "witnesses as a person of faith and prayer." *Id.*, ¶ 44.

The Corporation maintains that ACE AmeriCorps teachers are "well aware that [it] prohibits providing religious instruction, conducting worship services, or engaging in any form of proselytization as part of AmeriCorps service, and that no such activities may be included in the 1700 hours of service needed to receive a full-time AmeriCorps education award." Def.'s Statement of Facts, ¶ 97.

2. The Catholic Network of Volunteer Service

The Catholic Network of Volunteer Service ("CNVS") is a religious organization composed of a "loose network" of about 209 member organizations, of which approximately 80 percent are Catholic. The other 20 percent are groups affiliated with other Christian denominations. Approximately 30 percent of AmeriCorps participants serving as teachers in religious schools through CNVS member organizations teach religious subjects. Pl.'s Statement of Facts, ¶ 60.

CNVS maintains a "Response Directory," located on the world wide web at *http://www.cnvs.org*. It contains a description of volunteer opportunities that are available through CNVS member organizations, and can be searched electronically by category of service activity. A search for placements conducted by Plaintiff on February 17 and March 1, 2004 disclosed the following: (1) The Franciscan Volunteer Ministry indicated that participants are required to be "[d]ependable and flexible Christian men and women." Pl.'s Reply, at 21. Under "Goal of the Program," the

Ministry indicated that it "encourage[s][its] volunteers as lay people to come to full stature in the Catholic Church...." *Id.* (2) The Pacific Alliance for Catholic Education indicated that participants "[m]ust be Catholic." *Id.* (3) Red Cloud Volunteers indicated that participants are required to be "Christian." *Id.* One of the goals of the program is that "[v]olunteers integrate their Christian faith through service to others...."[8] *Id.*

C. The Corporation's Monitoring of AmeriCorps Participants' Timekeeping and Eligibility for AmeriCorps Education Awards

In applying for an AmeriCorps education award, grantees must execute a set of Corporation-prescribed "Assurances and Certifications," by which the grantee certifies that it will, if awarded a grant, comply with certain stated Corporation requirements, including that it "[w]ill comply with all rules regarding prohibited activities ... and will ensure that no assistance made available by the Corporation will be used to support any such prohibited activities." Oltmann Decl., ¶ 36, Ex. D.

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[8] In the Corporation's Opposition to Plaintiff's Statement of Facts, filed on January 29, 2004, the Corporation represented that CNVS was "implementing correcting action" with regard to these organizations. As of June 2, 2004, no changes had been made to the position description posted by Red Cloud Volunteers. As of June 28, 2004, however, the appropriate changes had been made. *See* CNVS Response Directory *at* http:// www.cnvs.org.

At oral argument, the Corporation represented that Red Cloud Volunteers was no longer an AmeriCorps EAP host site. As of June 28, 2004, however, Red Cloud Volunteers was still listed on the CNVS Response Directory as an AmeriCorps EAP host site. *See id.*

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Each grantee also must enter into a written "site agreement" with each of its host sites. *Id.*, ¶ 40. These agreements set forth "roles and responsibilities to ensure that the grant provisions and program requirements are met." *Id.* Additionally, the Corporation requires grantees to provide formal orientation for new AmeriCorps participants, and identifies the elements that must be included in the orientation. *Id.*, ¶ 39.

Each year, the Corporation disseminates AmeriCorps Guidelines to all grantees. The 2004 AmeriCorps Guidelines "emphasize that grantees are responsible for monitoring the service activities of participants and for the timely and accurate documentation and certification of service hours." Def.'s Statement of Facts, ¶ 31.

AmeriCorps participants must record their service hours on timesheets. Since August 2002, the Corporation has required AmeriCorps participants who are placed as teachers in religious schools to document the specific activities for which they are accumulating service hours toward their 1700 minimum service commitment, such as which subjects they are teaching. Pl.'s Statement of Facts, ¶ 128. AmeriCorps participants submit their timesheets to the grantees in whose programs they are serving, such as ACE and CNVS. The grantees enter the AmeriCorps hours from the timesheets into a web-based reporting system maintained by the Corporation.

The timesheets are not provided to or reviewed by the Corporation prior to the granting of the $4,725 education award. The Corporation reviews the timesheets only during site visits or in the event of an audit.

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Upon completing a term of service in the AmeriCorps EAP, each AmeriCorps participant is required to complete an exit form. The first page of the exit form, which is completed by the participant, includes personal information such as his or her name, address, and social security number. It does not include the number of hours of AmeriCorps service he or she has performed. The AmeriCorps participant must sign the first page of the exit form with the understanding that a "knowing and willful false statement on this fo.m can be punished by a fine or imprisonment or both under Section 1001 of Title 18, U.S.C.." *Id.*, ¶ 136. The second page of the exit form, which is completed by the certifying official, provides the number of service hours the participant performed. There is no space for the AmeriCorps participant to sign his or her name to verify the number of hours reported on this page. Neither page of the exit form specifies the particular activities (such as the subject(s) taught) for which the AmeriCorps participant accumulated service hours.

Since October 2001, the Corporation has also required each AmeriCorps participant who performs service hours as a teacher in a religious school to sign an additional "certification" before receiving an education award. Although that certification states that the service hours reported on the exit form do not "include any religious instruction, worship, or proselytization," Oltmann Decl., ¶ 42, Ex. F, it does not require the signer to acknowledge that any "knowing and willful false statement on this form can be punished by a fine or imprisonment or both under Section 1001 of Title 18, U.S.C.." Pl.'s Statement of Facts, ¶ 141. It also does not require that the signature be made under penalty of perjury. *Id.* The supervisor at the host site where the AmeriCorps participant performed his or her service

must also sign the certification; that signature is also not required to be made under oath or penalty of perjury. The Corporation maintains that it has instructed grantees which place AmeriCorps participants as teachers in religious schools not to submit an exit form for any such participants until their certifications have been completed.

Neither the exit form nor the certification is provided to or reviewed by the Corporation prior to the granting of an education award.

The Corporation conducts site visits in an effort to directly monitor grantees and AmeriCorps participants. In 2001, the Corporation conducted a total of 5 or 6 site visits per year to the 328 religious schools in which AmeriCorps participants were serving as teachers. Prior to the fall of 2002, the Corporation had never visited a religious school at which CNVS member organizations placed AmeriCorps participants as teachers. *Id.*, ¶ 152. In 2002, the Corporation visited 10 grantees and 37 host sites. All site visits to grantees are pre-announced. *Id.*, ¶ 156.

Despite the fact that all site visits are pre-announced, site visit reports have still revealed serious infractions of Corporation policy. *Id.*, ¶ 166. Specifically, site visits have found some AmeriCorps participants recording time engaging in religious activity on their timesheets, and others have been confused over which types of activities may be recorded and which may not. Other site visits have found timesheets that were signed months after the work was completed, or not at all. And some site visits have revealed documents in the participants' AmeriCorps files which detailed explicit religious missions or requirements associated with their positions with the schools.

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In addition to site visits, the Corporation has ongoing telephonic, electronic, and paper communications with EAP grantees that include compliance issues. Def.'s Statement of Facts, ¶ 71. The Corporation also assigns a program officer to oversee each grantee and conducts monthly conference calls with grantees to discuss program operations. *Id.*, ¶ ¶ 72, 73.

Plaintiff cites four individual AmeriCorps participants as examples of problems in the administration of the AmeriCorps EAP.

AmeriCorps participants Kelly Stolz and Jennifer B'Oris were placed in religious schools in Boston, Massachusetts during the 2002-2003 school year through the Urban Catholic Teacher Corps, a CNVS member organization. The Urban Catholic Teacher Corps' "Handbook for Community Living" for 2002-2003 stated that "Corps members are expected to attend weekly Mass," and that "[p]rayer and sharing the stories of God's action daily life are the foundation of the Urban Catholic Teacher Corps.... [T]hus, Corps members must establish a regular day and time for weekly prayer and faith sharing." Pl.'s Statement of Facts, at ¶ 93. The mission statement of the school where Ms. Stolz was placed stated that "[t]o Preach the Gospel as Jesus did" is one of the "three-fold aim [s]" of the school. *Id.*, at ¶ 94.

Ms. Stolz testified that she integrated her religious instruction throughout the school day and led her pre-kindergarten students in prayer four times a day. *Id.*, ¶ 97. Ms. B'Oris taught a third-grade class and similarly taught religion, including a 30-minute period of direct religious

instruction; she also led her students in prayer 3 times a day. *Id.*, ¶ 101-02. Both Ms. Stolz and Ms. B'Oris attended Mass with their students. Religious symbols were visible in both teachers' classrooms, including items such as crucifixes, statutes of Mary, and the Hail Mary prayer written on posters. *Id.*, ¶ 99- 103. An AmeriCorps sign was posted in both teachers' classrooms and at the entrance of the schools where they taught. *Id.*, ¶ 100, 104.

AmeriCorps participant Mary-Colleen Duggan was placed by ACE at a religious school in Baton Rouge, Louisiana during both the 1999-2000 and the 2000-2001 school years. In her first year, Ms. Duggan taught only religion; she also led her students in prayer at the beginning of each class, as the school required her to do. Ms. Duggan reported to the Corporation that she performed more than 1700 hours of AmeriCorps service and she earned the $4,725 education award. *See id.*, ¶ ¶ 106-109. According to the Corporation, Ms. Duggan "fulfilled her AmeriCorps requirements through supervision of extracurricular activities." Def.'s Opp'n, at 14.

AmeriCorps participant Cynthia Ihm Lasage was placed in a religious school in New York during the 1997-1998 school year through the Vincentian Service Corps ("VSC").[9] VSC's mission statement during the relevant time period stated, "Responding to the call of the gospel, in the spirit of St. Vincent de Paul, lay women and men of the

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[9] Plaintiff claims that at the time Ms. Lasage was an AmeriCorps participant, the VSC was administered by the CNVS. According to the Corporation, during the relevant time period, the VSC was administered by the National Council of Churches. *See* Def.'s Opp'n to Pl.'s Statement of Facts, ¶ 119.

Vincentian Service Corps serve those who are poor, while growing in prayer and living simply in community." Pl.'s Statement of Facts, ¶ 119. Ms. Lasage taught 3 religion courses each day to students in the sixth, seventh, and eighth grades. She also attended Mass and prayed with her students.

When Ms. Lasage completed her service, she wrote a letter to the Corporation which stated that her position "was that of a religious educator." *Id.*, at 124. The letter also stated that "[m]ostly I taught the students to adhere to values as defined by the Judeo-Christian religion on which this country is founded." *Id.* Ms. Lasage's letter expressed concern as to whether, given her role as a religious educator, she should be entitled to her AmeriCorps education award. The Corporation granted Ms. Lasage the $4,725 education award after it reviewed her service activities and she provided a second certification. Def.'s Opp'n to Pl.'s Statement of Facts, ¶ 126.

The Corporation does not dispute that AmeriCorps participants, "on their own time," teach classes in religion, or participate in other religious activities. The Corporation categorically denies that any of the four individuals cited by Plaintiff received an education award for hours that included time spent in religious activities.[10]

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[10] According to the Corporation, Ms. Duggan is the only AmeriCorps participant who taught only religion. Def.'s Statement of Facts, ¶ 107. The Corporation contends that Notre Dame has since changed its policy to prohibit AmeriCorps participants from teaching only religion. *See* Def.'s Opp'n, at 14.

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D. Direct Monetary Grants to Faith-Based AmeriCorps EAP Grantees

Each grantee in the AmeriCorps EAP receives a monetary grant from the Corporation of up to $400 per year for every full-time AmeriCorps participant that it enrolls. While the Corporation provides these grants "to assist with program-management costs," *id.*, ¶ 207, it "does not require grantees to account for the uses of these funds" because it claims that "the legitimate needs of administering the program, at the grantee level and below, are expected to exceed the amount of the $400 grants." Oltmann Decl., ¶ 12. The Corporation points out that "the grantees referred to in the complaint affirmatively attest that no portion of the [ ] grants is used for religious activities." Def.'s Opp'n, at 42.

The ACE deposits these grants into a restricted account and uses them to help pay the salaries of the faculty members who teach secular subjects. Staud Decl., ¶ 12. These funds cover approximately 8 percent of the faculty members' salaries. *Id.*

The CNVS does not segregate these funds into a separate account; rather, it deposits all of the funding it receives into a single, general checking account. CNVS shares $120 of each $400 grant with its member organizations. According to James G. Lindsay, Executive Director of the CNVS, "[a]t the CNVS level, the[ ] funds are used for management costs, including program staff salaries, training, supplies, postage, conference fees, and technical assistance." Lindsay Decl., ¶ 11. CNVS's member organizations use their $120 portion "to cover management costs, including program staff salaries, monitoring, reporting, training, supplies, and postage." *Id.*, ¶ 12.

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E. Procedural History

Plaintiff filed the instant action in October 2002. Plaintiff seeks

> a judicial declaration that it is contrary to law (1) for the Corporation to approve or qualify the ACE Program, CNVS Program, and Nebraska Program, and any other similar AmeriCorps program, to place AmeriCorps participants as religion teachers in private sectarian schools; (2) for the Corporation to provide or administer federal financial assistance, including educational awards, for AmeriCorps participants who teach religion in private sectarian schools; and (3) for the Corporation to fund, directly or indirectly, the religious activities of the ACE Program, CNVS Program, and Nebraska Program, and any other similar AmeriCorps program.

Compl., at 14. Plaintiff also seeks "permanent injunctive relief requiring the Corporation to conform its conduct to such judicial declaration." *Id.*

On December 15, 2003, the parties filed the instant three Motions for Summary Judgment.

II. Standard of Review on a Motion for Summary Judgment

Summary judgment should be granted if the pleadings, depositions, answers to interrogatories, and admissions on file, together with any affidavits or

declarations, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. *See* Fed.R.Civ.P. 56. Material facts are those that "might affect the outcome of the suit under the governing law." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986).

The party seeking summary judgment bears the initial burden of demonstrating the absence of a genuine issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986). The nonmoving party then must "go beyond the pleadings and by [its] own affidavits, or by 'depositions, answers to interrogatories, and admissions on file,' designate 'specific facts showing that there is a genuine issue for trial.'" *Id.* at 324, 106 S.Ct. 2548. *See Laningham v. U.S. Navy*, 813 F.2d 1236, 1242 (D.C.Cir.1987) (nonmoving party has affirmative duty "to provide evidence that would permit a reasonable jury to find" in its favor); *Crenshaw v. Georgetown Univ.*, 23 F.Supp.2d 11, (D.D.C.1998) (noting that "adverse party must do more than simply 'show that there is some metaphysical doubt as to the material facts'" (quoting *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586, 106 S.Ct. 1348, 89 L.Ed.2d 538 (1986))).

In deciding a motion for summary judgment, "the court must draw all reasonable inferences in favor of the nonmoving party, and it may not make credibility determinations or weigh the evidence." *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 150, 120 S.Ct. 2097, 147 L.Ed.2d 105 (2000). *See Washington Post Co. v. U.S. Dep't of Health and Human Servs.*, 865 F.2d 320, 325 (D.C.Cir.1989). Ultimately, the court must determine "whether the evidence presents a sufficient disagreement to

require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." *Anderson*, 477 U.S. at 251-52, 106 S.Ct. 2505.

III. The Applicable Law for Evaluating Church-State Relations Under the Establishment Clause

The Establishment Clause states that "Congress shall make no law respecting an establishment of religion...." U.S. Const. amend. I. The touchstone for evaluating church-state relations under the Establishment Clause is the test enunciated by the Supreme Court in *Lemon v. Kurtzman*, 403 U.S. 602, 612-13, 91 S.Ct. 2105, 29 L.Ed.2d 745 (1971), as modified by *Agostini v. Felton*, 521 U.S. 203, 232, 117 S.Ct. 1997, 138 L.Ed.2d 391 (1997). As originally formulated, the *Lemon* test required that "a statute or practice which touches upon religion, if it is to be permissible under the Establishment Clause, must have a secular purpose; it must neither advance nor inhibit religion in its principal or primary effect; and it must not foster an excessive entanglement with religion." *Lemon*, 403 U.S. at 612-13, 91 S.Ct. 2105. In *Agostini*, the Supreme Court modified the *Lemon* test in cases involving school aid, emphasizing the continuing vitality of the first two prongs of *Lemon*, but concluding that *Lemon*'s entanglement inquiry could be considered "as simply one criterion relevant to determining a statute's effect." *Mitchell v. Helms*, 530 U.S. 793, 808, 120 S.Ct. 2530, 147 L.Ed.2d 660 (2000) (Thomas, J., plurality). *See Agostini*, 521 U.S. at 232-33, 117 S.Ct. 1997. Thus, when presented with Establishment Clause challenges, the reviewing court is required to ask "'whether the government acted with the purpose of advancing or inhibiting religion' and 'whether the aid has the effect of advancing or inhibiting religion.'" *Mitchell*, 530 U.S. at 845, 120 S.Ct. 2530

(O'Connor, J., concurrence) (quoting *Agostini*, 521 U.S. at 222-23, 117 S.Ct. 1997).

Plaintiff concedes that the AmeriCorps EAP was enacted for the valid secular purpose of "expand[ing] educational opportunity by rewarding individuals who participate in national service with an increased ability to pursue higher education or job training...." 42 U.S.C. § 12501(b)(3). Thus, the question presented is whether the AmeriCorps EAP, by (1) placing AmeriCorps participants as teachers in religious schools and allowing them to teach religion to their students throughout the school day, lead their students in prayer multiple times a day, and attend Mass with their students; and by (2) providing monetary grants of up to $400 per year to faith-based AmeriCorps EAP grantees for every full-time AmeriCorps participant the grantees enroll, has the "effect" of advancing religion.

In *Agostini*, the Court used "three primary criteria" to evaluate whether government aid has the effect of advancing religion: "(1) whether the aid results in governmental indoctrination, (2) whether the aid program defines its recipients by reference to religion, and (3) whether the aid creates an excessive entanglement between government and religion." *Mitchell*, 530 U.S. at 845, 120 S.Ct. 2530 (O'Connor, J., concurrence). These same factors are used to evaluate whether a government-aid program constitutes an unconstitutional government "endorsement" of religion. *Id.*

Plaintiff does not assert that the challenged portions of the AmeriCorps EAP program either define its recipients by reference to religion or foster excessive governmental entanglement with religion. Consequently, the Court need only examine whether the challenged portions of the

AmeriCorps EAP result in governmental indoctrination. To meet this criterion, Plaintiff must establish that (1) the government funding of the challenged portions of the AmeriCorps EAP constitutes indoctrination or results in it; and (2) that such indoctrination is attributable to the government. *See DeStefano*, 247 F.3d at 414 (citing *Agostini*, 521 U.S. at 226, 117 S.Ct. 1997).[11]

IV. Analysis

A. The Government Funding of the Challenged Portions of the AmeriCorps EAP Results in Impermissible Government Indoctrination

To "indoctrinate" means "[t]o instruct in a body of doctrine or principles.... To imbue with a partisan or ideological point of view...." The American Heritage Dictionary of the English Language 984 (4th ed. 2000). The Supreme Court uses "indoctrination" synonymously with "inculcation." *See Mitchell*, 530 U.S. at 858-59, 120 S.Ct.

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[11] Plaintiff relies heavily in its briefs on *School Dist. of City of Grand Rapids v. Ball*, 473 U.S. 373, 105 S.Ct. 3216, 87 L.Ed.2d 267 (1985) in support of this claim. However, the precedential value of that case was severely undercut by the Supreme Court's decision in *Agostini*, 521 U.S. at 222, 117 S.Ct. 1997, rejecting the three major assumptions on which *Ball* rested:

> (i) any public employee who works on the premises of a religious school is presumed to inculcate religion in her work; (ii) the presence of public employees on private school premises creates a symbolic union between church and state; and (iii) any and all public aid that directly aids the educational function of religious schools impermissibly finances religious indoctrination, even if the aid reaches such schools as a consequence of private decisionmaking.

2530 (O'Connor, J., concurrence); *Agostini*, 521 U.S. at 223-24, 117 S.Ct. 1997. To "inculcate" is "[t]o impress (something) upon the mind of another by frequent instruction or repetition; [to] instill." American Heritage Dictionary at 889 (also using "indoctrinate" as a synonym for "inculcate").

In *Mitchell*, the Supreme Court concluded that it is "inappropriate to presume inculcation of religion" by publicly funded teachers in religious schools. *Mitchell*, 530 U.S. at 858, 120 S.Ct. 2530 (O'Connor, J., concurrence). *See Agostini*, 521 U.S. at 223-24, 117 S.Ct. 1997 (plaintiff raising an Establishment Clause challenge must present evidence that the government aid in question has resulted in religious indoctrination); *Zobrest v. Catalina Foothills Sch. Dist.*, 509 U.S. 1, 13, 113 S.Ct. 2462, 125 L.Ed.2d 1 (1993) (rejecting presumption of indoctrination because it constitutes a "flat rule, smacking of antiquated notions of 'taint,' [that] would indeed exalt form over substance"). In the instant case, however, it is unnecessary to rely on any such presumption in order to conclude that the teaching of religion by AmeriCorps participants in religious schools inculcates religion. This is because the parties do not deny that the faith-based AmeriCorps EAP grantees at issue in the instant case inculcate religion, primarily through the classroom work of their teachers. Thus, it is clear that the government funding of the challenged portions of the AmeriCorps EAP results in indoctrination.

The Establishment Clause, however, bars indoctrination only if it "could reasonably be attributed to governmental action." *Mitchell*, 530 U.S. at 809, 120 S.Ct. 2530 (Thomas, J., plurality). Accordingly, simply because a government-funded program engages in indoctrination does not mean that the program's funding is unconstitutional.

Appendix B

In distinguishing between indoctrination that is and is not attributable to governmental action, the Supreme Court has "consistently turned to the principle of neutrality, upholding aid that is offered to a broad range of groups or persons without regard to their religion." *Id.*

In its plurality opinion in *Mitchell*, the Supreme Court explained that "[i]f the religious, irreligious, and areligious are all alike eligible for governmental aid, no one would conclude that any indoctrination that any particular recipient conducts has been done at the behest of the government."[12] *Id.* While Justice Thomas' plurality opinion emphasizes that the neutrality of aid criteria is the most important factor in considering the effect of a government aid program, *see Mitchell*, 530 U.S. at 809-10, 120 S.Ct. 2530, five Justices in *Mitchell* explicitly disagreed with Justice Thomas' discussion on this point. *See id.*, at 839, 120 S.Ct. 2530 (O'Connor, J., concurrence, joined by Breyer, J.) (neutrality "is by no means the only axiom in the history and precedent of the Establishment Clause") (internal citation omitted); *id.*, at 884, 120 S.Ct. 2530 (Souter, J., dissent, joined by Stevens, J. and Ginsburg, J.) (same). Under these circumstances, "Justice O'Connor's position on this issue ... is [ ] the majority view of the Supreme Court."[13] *DeStefano*, 247 F.3d at 418. *See Gentala v. City of Tucson*, 244 F.3d

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[12] Chief Justice Rehnquist and Justices Scalia and Kennedy joined Justice Thomas in the plurality opinion.

[13] *See King v. Palmer*, 950 F.2d 771, 780 (D.C.Cir.1991) ("'[W]hen the Court issues fragmented opinions, the opinion of the Justices concurring in the judgment on the 'narrowest grounds' should be regarded as the Court's holding.'") (quoting *Marks v. United States*, 430 U.S. 188, 193, 97 S.Ct. 990, 51 L.Ed.2d 260 (1977)).

1065, 1076 (9th Cir.2001) (same); *Columbia Union College v. Oliver,* 254 F.3d 496, 504 (4th Cir.2001) (same). Therefore, while the neutrality of aid criteria is an important factor, it is "not alone sufficient to qualify the aid as constitutional." *Mitchell,* 530 U.S. at 840, 120 S.Ct. 2530 (O'Connor, J., concurrence).

In addition to "neutrality," the Supreme Court has "repeatedly considered whether any governmental aid that goes to a religious institution does so 'only as a result of the genuinely independent and private choices of individuals.'" *Id.,* at 810, 120 S.Ct. 2530 (Thomas, J., plurality) (quoting *Agostini,* 521 U.S. at 226, 117 S.Ct. 1997). *See Zelman v. Simmons-Harris,* 536 U.S. 639, 651, 122 S.Ct. 2460, 153 L.Ed.2d 604 (2002) (inquiry is "whether [aid] recipients generally [are] empowered to direct the aid to schools or institutions of their own choosing").

In *Mitchell,* the Supreme Court also held that the Establishment Clause "requires that aid to religious schools not be impermissibly religious in nature." *Mitchell,* 530 U.S. at 820, 120 S.Ct. 2530 (Thomas J., plurality). "So long as the governmental aid is not itself 'unsuitable for use in the public schools because of its religious content,' and eligibility for aid is determined in a constitutionally permissible manner, any use of that aid to indoctrinate cannot be attributed to the government and is thus not of constitutional concern." *Id.,* at 820, 120 S.Ct. 2530 (Thomas J., plurality) (quoting *Bd. of Educ. of Cent. Sch. Dist. No. 1 v. Allen,* 392 U.S. 236, 245, 88 S.Ct. 1923, 20 L.Ed.2d 1060 (1968) (permitting the provision of secular textbooks the content of which had been approved by the public school authorities as appropriate for use in public schools)). *See Agostini,* 521 U.S. at 223-25, 117 S.Ct. 1997 (approving the

use of public employees to teach secular remedial classes in private schools, in part, because there was no reason to suspect that religious indoctrination would be part of such governmental aid); *Zobrest*, 509 U.S. at 13, 113 S.Ct. 2462 (emphasizing the presence of private choice and the absence of government-provided sectarian content).

In sum, a government aid program does not result in impermissible governmental indoctrination if "it determines eligibility for aid neutrally, allocates that aid based on ... private choice[ ] ..., and does not provide aid that has an impermissible content." *Mitchell*, 530 U.S. at 829, 120 S.Ct. 2530 (Thomas, J., plurality).

1. The Corporation does not determine eligibility for government aid neutrally

It is clear from the record in the instant case that the Corporation does not offer aid "to a broad range of groups or persons without regard to their religion" and therefore does not determine eligibility for government aid neutrally. *Mitchell*, 530 U.S. at 809, 120 S.Ct. 2530 (Thomas, J., plurality).

First, the Corporation uses highly discretionary criteria – as opposed to fixed, objective, measurable criteria – to pick and choose among potentially qualifying AmeriCorps EAP grantees. For example, it assesses the extent to which the grantee applicant (1) "identifies a compelling need and describes how that need was identified," Oltmann Decl., ¶ 15; and (2) "[b]ring[s] together people of different backgrounds." Second Oltmann

Decl., Ex. B, at 41.[14] In direct contrast, the government aid program upheld by the Supreme Court in *Zelman* distributed benefits to every family below a stated income level which lived in a designated geographic area. *See Zelman*, 536 U.S. at 646, 122 S.Ct. 2460. Similarly, the government aid program upheld by the Supreme Court in *Zobrest* distributed benefits "neutrally to any child qualifying as 'disabled' under the [statute]...." *Zobrest*, 509 U.S. at 9, 113 S.Ct. 2462. *See Mueller v. Allen*, 463 U.S. 388, 398, 103 S.Ct. 3062, 77 L.Ed.2d 721 (1983) (the challenged law "permits *all* parents ... to deduct their children's educational expenses") (emphasis in original).

Second, a number of programs openly require that AmeriCorps participants be of a particular faith. For example, a recent search of the CNVS online "Response Directory" revealed programs such as the Pacific Alliance for Catholic Education, which listed among its requirements that participants "[m]ust be Catholic," *id.*, at 21, 113 S.Ct. 2462; the Franciscan Volunteer Ministry, which listed among its requirements that participants are required to be "[d]ependable and flexible Christian men and women," *id.*; and Red Cloud Volunteers, which listed among its requirements that participants are required to be "Christian." *Id.*

Thus, given the record in the instant case which shows not only that the Corporation uses highly

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[14] The fact that there are substantial inconsistencies between the selection criteria as outlined in the 2004 AmeriCorps Guidelines and the selection criteria as explained by Oltmann in his Declaration illustrates the extent of discretion the Corporation enjoys in the grantee selection process.

discretionary criteria to select among potentially qualifying grantees, but also that a number of programs actually list among their requirements that AmeriCorps participants must be of a particular faith, it is clear that the Corporation does not determine eligibility for government aid neutrally.

2. The AmeriCorps EAP is not a program of "true private choice"

In addition to "neutrality," the Supreme Court has "repeatedly considered whether any governmental aid that goes to a religious institution does so 'only as a result of the genuinely independent and private choices of individuals.'" *Mitchell,* 530 U.S. at 810, 120 S.Ct. 2530 (Thomas J., plurality) (quoting *Agostini,* 521 U.S. at 226, 117 S.Ct. 1997).

The Corporation maintains that the AmeriCorps EAP is analogous to other "private choice" programs upheld by the Supreme Court because here, "individual participants choose where to use the government benefits at issue." Def.'s Mot., at 26. Specifically, it argues that it is the AmeriCorps participants – not the government – who, through their choice of placement, determine which programs receive Corporation funds; the funds, the Corporation claims, follow the AmeriCorps participant.

However, the record demonstrates clearly that the AmeriCorps EAP is not a program of "true private choice." As a matter of Corporation policy, AmeriCorps participants may enroll only in programs that the Corporation has pre-approved. Thus, participants are not free to choose the program for which they will receive government funding.

Appendix B

The Corporation also argues that the AmeriCorps EAP is similar to the private choice programs upheld by the Supreme Court in *Mueller* (permitting tax deductions for various educational expenses, including private school tuition); in *Witters v. Washington Dep't of Servs. For the Blind*, 474 U.S. 481, 106 S.Ct. 748, 88 L.Ed.2d 846 (1986) (offering vocational education scholarship to visually disabled seminarian not unconstitutional); in *Zobrest* (providing a sign language interpreter for deaf child in religious secondary school not unconstitutional); and in *Zelman* (allowing the state to provide vouchers to poor elementary and secondary school students to attend any public or private school). The cases cited by the Corporation are distinguishable for two reasons.

First, in the cases cited, the private individual had the statutory right to apply the government funding to any school program of his or her liking; in this way, the government aid was virtually an entitlement. In contrast, in the instant case, the AmeriCorps participants have no such free choice of placement because, as a matter of Corporation policy, AmeriCorps participants may enroll only in programs that it has pre-approved. Second, in the instant case, the grantees actively recruit and select AmeriCorps participants and a number of grantee programs actually list among their requirements that AmeriCorps participants must be of a particular faith.[15]

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[15] Grantees are responsible for recruiting and selecting AmeriCorps EAP participants for their individual programs. *See* Second Oltmann Decl., Ex. B, at 16. In fact, a key performance measure is the grantee's ability to enroll the number of full-time and less than full-time members agreed upon in its approved application. *See id.*

Thus, given the record in the instant case which shows that Corporation policy limits enrollment of AmeriCorps participants to programs that the Corporation has pre-approved, as well as that a number of programs actually list among their requirements that AmeriCorps participants must be of a particular faith, it is clear that the AmeriCorps EAP is not a program of "true private choice."

3. The AmeriCorps educational awards being challenged have an impermissible content

In *Mitchell,* the Supreme Court held that the Establishment Clause "requires that aid to religious schools not be impermissibly religious in nature." *Mitchell,* 530 U.S. at 820, 120 S.Ct. 2530 (Thomas J., plurality). It is clear from the record in the instant case that the $4,725 AmeriCorps education awards being challenged are in fact impermissibly religious in their nature and content.

The Corporation defends the operation of its EAP on the ground that its timekeeping policies are sufficient to ensure that the religious instruction undertaken by AmeriCorps participants during the school day is separate from their AmeriCorps service, and therefore the government aid in question does not have any impermissible content. Specifically, the Corporation maintains that its timekeeping policies ensure that the AmeriCorps participants are not given service hour credit toward their education award for the time they spend in religious activity. This argument must be rejected for two reasons.

First, the Corporation's monitoring efforts are totally inadequate to ensure that its timekeeping policies are followed. In *Bowen v. Kendrick,* 487 U.S. 589, 615, 108

S.Ct. 2562, 101 L.Ed.2d 520 (1988), the Supreme Court recognized the necessity and importance of an agency monitoring its grants. *See Agostini*, 521 U.S. at 234-35, 117 S.Ct. 1997 (upholding government aid program in part because it contained appropriate "safeguards"); *Mitchell*, 530 U.S. at 861, 120 S.Ct. 2530 (O'Connor, J., concurrence) (reviewing the monitoring mechanisms in place and concluding that "[t]he safeguards employed by the program are constitutionally sufficient").

The Corporation's monitoring efforts are clearly insufficient when measured against the programs at issue in the Supreme Court's recent cases. In *Agostini*, the Supreme Court found that the government aid program at issue employed appropriate "safeguards" where "a publicly employed field supervisor was to attempt to make *at least one unannounced visit to each teacher's classroom every month.*" *Agostini*, 521 U.S. at 212, 117 S.Ct. 1997 (emphasis added). In *Mitchell*, the state, among other monitoring measures, conducted "*annual monitoring visits to each of the nonpublic schools* receiving Chapter 2 aid." *Mitchell*, 530 U.S. at 862, 120 S.Ct. 2530 (O'Connor, J., concurrence) (emphasis added).

In contrast, in the instant case, the Corporation conducts only a handful of pre-announced site visits each year to religious schools in which AmeriCorps participants are serving as teachers. Moreover, as Plaintiff correctly points out, "even these infrequent, pre-announced site visits have revealed what one Corporation official has described as 'serious' infractions of the Corporation's policies."[16] Pl.'s

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[16] The Corporation maintains that "day-to-day monitoring of the AmeriCorps participants' timekeeping is more appropriately left to the

Opp'n, at 21.

Second, even if the Court assumes that the Corporation accurately estimates the time AmeriCorps participants spend on religious versus non-religious activities, it is not possible to clearly distinguish between the two roles the AmeriCorps participants supposedly play. AmeriCorps participants placed as teachers in religious schools teach religion throughout the school day, lead their students in prayer multiple times a day, and attend Mass with their students. In addition, one of the factors ACE uses in evaluating its AmeriCorps teachers is whether the teacher "provides a variety of prayer experiences" and "witnesses as a person of faith and prayer." Pl.'s Statement of Facts, ¶ 44. In short, the record makes clear that there is a total blurring of religious and non-religious activities.

It is also significant that the Corporation "expects" that its "Education Awards Programs and members take specific action to create an identity that includes AmeriCorps symbols and networks." Pl.'s Ex. A-2, at C 3347. Indeed, the concept of "AmeriCorps Identity," i.e., "the extent to which the provision of AmeriCorps funding is outwardly evident at the site," is one of the specific items that Corporation personnel look for when they conduct site visits at religious schools. Oltmann Decl., ¶ 52. Corporation

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grantees, which supervise and have direct knowledge of the particular activities of a host site – and not to the Corporation." Def.'s Opp'n, at 32. The Corporation also contends that the problems which Plaintiff points to "are *de minimis* – isolated instances by private parties who misunderstand the program's rules prohibiting any religious activities within the scope of AmeriCorps hours." *Id.*, at 33. Given the record in the instant case, these arguments are not persuasive.

personnel are also asked to inquire whether the program in question "identif [ies] itself, and ... the members identify themselves, with AmeriCorps, through the use of signs, T-shirts, sweatshirts, banners, logos that incorporate the A*C logo." Pl.'s Ex. A-2, at C 3347.

It is well established that "[a] school which operates to commingle religion with other instruction plainly cannot completely secularize its instruction." *Lemon,* 403 U.S. at 636-37, 91 S.Ct. 2105. *See Ball,* 473 U.S. at 384, 105 S.Ct. 3216 (citing *Meek v. Pittenger,* 421 U.S. 349, 356, 95 S.Ct. 1753, 44 L.Ed.2d 217 (1975), *overruled on other grounds,* ("The very purpose of many of those [religious] schools is to provide an integrated secular and religious education"), *Walz v. Tax Comm'n,* 397 U.S. 664, 671, 90 S.Ct. 1409, 25 L.Ed.2d 697 (1970) ("to assure future adherents to a particular faith" is "an affirmative if not dominant policy of church schools"), *Lemon,* 403 U.S. at 657, 91 S.Ct. 2105 ("[T]he secular education those schools provide goes hand in hand with the religious mission that is the only reason for the schools' existence. Within that institution, the two are inextricably intertwined.")).

Thus, it is clear from the record in the instant case that the Corporation's monitoring efforts are not adequate to ensure that its timekeeping policies are followed, and thus that the government aid in question does not have an impermissible content. Moreover, even if the Court assumed that the Corporation could accurately estimate the time AmeriCorps participants spend on religious versus non-religious matters, it is not possible to clearly distinguish between the two roles the AmeriCorps participants are

supposed to play.[17]

B. The Monetary Grants that the Corporation Provides Directly to Faith-Based AmeriCorps EAP Grantees Are Unconstitutional

The standard for evaluating the constitutionality of direct monetary aid announced in *Comm. For Public Educ. v. Nyquist,* 413 U.S. 756, 93 S.Ct. 2955, 37 L.Ed.2d 948 (1973) is controlling in the instant case.[18] In *Nyquist,* the Supreme Court held that "[i]n the absence of an effective

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[17] The Corporation maintains that "Supreme Court precedent has established that the mere presence of AmeriCorps participants in religious schools does not result in governmental indoctrination, any more than such indoctrination occurs because of the presence, in religious schools, of public school teachers (upheld in *Agostini*) or government-loaned instructional equipment (upheld in *Mitchell*)." Def.'s Opp'n, at 16. This argument is unconvincing because in the cases cited by the Corporation, the Supreme Court found no establishment clause violation where public support was provided for specifically identified secular Title I services, *see Agostini,* 521 U.S. at 211, 117 S.Ct. 1997, or educational materials and equipment, *see Mitchell,* 530 U.S. at 801, 120 S.Ct. 2530 (Thomas, J., plurality). In contrast, in the instant case, the Corporation chooses to fund faith-based grantees. This distinguishes the instant case from those in which the government sponsored supplementary educational aids that were inherently secular, but allowed their recipients to divert the funds to purchase that supplementary aid for sectarian purposes.

[18] In *Zelman,* the Supreme Court expressly held that "*Nyquist* does not govern neutral educational assistance programs that ... offer aid directly to a broad class of individuals defined without regard to religion." *Zelman,* 536 U.S. at 641, 122 S.Ct. 2460. As discussed *supra,* the Corporation does not determine eligibility for government aid neutrally. Accordingly, the instant case fits squarely within the category of cases governed by *Nyquist.*

means of guaranteeing that the [government] aid derived from public funds will be used *exclusively* for secular, neutral, and nonideological purposes, ... direct aid in whatever form is invalid." *Nyquist,* 413 U.S. at 780, 93 S.Ct. 2955, 37 L.Ed.2d 948 (1973) (emphasis added).

Under *Nyquist,* the $400 grants that the Corporation provides directly to faith-based AmeriCorps EAP grantees are unconstitutional.[19] It is undisputed that the Corporation "does not require grantees to account for the uses of these funds" because it claims that the secular administrative costs of the AmeriCorps EAP are "expected" to exceed the amount of the grant, thus ensuring that the grant is expended entirely on secular activities. Oltmann Decl., ¶ 12. In support of this argument, the Corporation points out that "the grantees referred to in the complaint affirmatively attest that no portion of the [ ] grants is used for religious activities." Def.'s Opp'n, at 42.

The Corporation's "expectation" that the grantees

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[19] The Corporation argues that because "these payments are based on the number of AmeriCorps participants enrolled with the grantee, and depend entirely upon the choice of the individual participants to serve through that organization," "[r]ather than 'direct aid,' [ ] the [ ] grants are similar to the 'private-choice' programs upheld by the Supreme Court." Def.'s Opp'n, at 43. This argument is not supported by Supreme Court case law. These grants are "direct aid" rather than the result of "private choice" because the grants are paid directly to the faith-based grantees rather than through an intermediary. *See Mitchell,* 530 U.S. at 842-43, 120 S.Ct. 2530 (O'Connor, J., concurrence) ("a government program of direct aid to religious schools based on the number of students attending each school differs meaningfully from the government distributing aid directly to individual students who, in turn, decide to use the aid at the same religious schools").

will spend the direct monetary grants on secular administrative costs – without actually requiring any segregation or accounting for the use of the grants – is not sufficient to render the grants constitutional. *See Nyquist*, 413 U.S. at 778, 93 S.Ct. 2955, 37 L.Ed.2d 948 ("a mere statistical judgment will not suffice as a guarantee that state funds will not be used to finance religious education").

Thus, the direct $400 grant that the Corporation provides directly to faith-based AmeriCorps EAP grantees for each AmeriCorps participant is unconstitutional because it is clear from the record that the Corporation requires no segregation or accounting for the use of those funds so as to ensure that the money is spent only on secular activities.[20]

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[20] The Corporation cites to *Roemer v. Bd. of Pub. Works of Md.*, 426 U.S. 736, 96 S.Ct. 2337, 49 L.Ed.2d 179 (1976) and *Comm. for Public Educ. and Religious Liberty v. Regan*, 444 U.S. 646, 100 S.Ct. 840, 63 L.Ed.2d 94 (1980) in support of its claim that the $400 grants that it provides directly to faith-based AmeriCorps EAP grantees are constitutional. *Roemer*, which approved segregated funds after finding recipients not pervasively religious, is inapposite and *Regan* is distinguishable. In *Regan*, the Court upheld a New York statute which authorized the use of public funds to reimburse religious schools for performing various testing and reporting services mandated by state law partly because the challenged statute "provide[d] ample safeguards against excessive or misdirected reimbursement." *Regan*, 444 U.S. at 659, 100 S.Ct. 840. In the instant case, as discussed *supra*, the Corporation's monitoring efforts are not sufficient to ensure that the Corporation's timekeeping policies are followed, and thus that the government aid in question does not have an impermissible content.

C. The Court's Decision to Grant Plaintiff's Motion Does Not Require AmeriCorps Participants to Surrender Their First Amendment Rights

The Corporation argues that sustaining Plaintiff's challenge in the instant case would require AmeriCorps participants to "surrender their constitutionally protected rights to engage in certain religious exercise and speech activities on their own time." Def.'s Opp'n, at 2. This argument is totally without merit and borders on the disingenuous. It is clear from both Plaintiff's briefs and its representations at oral argument that Plaintiff is not asking the Court to restrict in any way the truly private religious activity and speech of AmeriCorps participants. It is also clear that the Court's decision to grant Plaintiff's Motion "does not require [AmeriCorps participants] to choose between their religious beliefs and receiving a government benefit." *Locke v. Davey*, 540 U.S. 712, 124 S.Ct. 1307, 1312-13, 158 L.Ed.2d 1 (2004) (holding that Washington State's restriction on the use of a state scholarship to pursue a theological degree did not violate the free exercise clause of the First Amendment). AmeriCorps participants placed as teachers in religious schools are free to attend any religious service and observe any religious tradition on their own time, i.e., outside of and separate from their AmeriCorps teaching assignments. Thus, the Court's decision to grant Plaintiff's Motion does not require AmeriCorps participants to surrender their First Amendment rights.

V. CONCLUSION

For the reasons stated, Plaintiff's Motion is **granted,** the Corporation's Motion is **denied,** and Notre Dame's Motion is **denied.**

Appendix B

An Order will issue with this opinion.

ORDER

Plaintiff, the American Jewish Congress, brings this action against the Corporation for National and Community Service ("Corporation"). The University of Notre Dame ("Notre Dame") is a Defendant-Intervenor. This matter is now before the Court on three Motions for Summary Judgment filed by Plaintiff, the Corporation, and Notre Dame. Upon consideration of the Motions, Oppositions, Replies, the June 2, 2004 Motions Hearing, and the entire record herein, and for the reasons set forth in the accompanying Memorandum Opinion, it is hereby

ORDERED that Plaintiff's Motion for Summary Judgment is **granted**; it is further

ORDERED that the Corporation's Motion for Summary Judgment is **denied**; it is further

ORDERED that Notre Dame's Motion for Summary Judgment is **denied**.

Appendix C

ORDER OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA DATED AUGUST 5, 2005

United States District Court,
District of Columbia.
AMERICAN JEWISH CONGRESS, Plaintiff,
v.
CORPORATION FOR NATIONAL AND COMMUNITY SERVICE, Defendant,
University of Notre Dame, Defendant-Intervenor.
No. CIV.A. 02-1948(GK).

ORDER GRANTING INJUNCTIVE RELIEF

On July 2, 2004, the Court found that the AmeriCorps Education Awards Program ("EAP") being challenged by Plaintiff American Jewish Congress in the above-captioned case results in impermissible government indoctrination in violation of the establishment clause of the First Amendment and granted summary judgment to Plaintiff. Upon consideration of the Notice by Plaintiff of Filing of Proposed Order Granting Injunctive Relief, and the Opposition thereto filed by Defendant Corporation for National and Community Service ("Corporation") and Defendant-Intervenor University of Notre-Dame, it is hereby

ORDERED that the Corporation, its officers, agents, servants, employees, attorneys and any persons acting in active concert or participation with the Corporation, are barred and enjoined from providing, awarding, or authorizing the provision or award of any federal financial assistance, including Education Awards, to AmeriCorps

participants who are placed as teachers in private sectarian schools pursuant to the AmeriCorps EAP and engage in impermissible government indoctrination, including the teaching of religion to students during the school day, the leading of students in prayer during the school day, and the attending of Mass with students during the school day. This injunction applies to all such AmeriCorps participants as of the date of entry of this Order. It is further

ORDERED that the Corporation, its officers, agents, servants, employees, attorneys and any persons acting in active concert or participation with the Corporation, are barred and enjoined from providing, awarding, or authorizing the provision or award of direct public funding to AmeriCorps EAP grantees which place AmeriCorps participants as teachers in private sectarian schools pursuant to the AmeriCorps EAP[1] unless and until such time as the Corporation can demonstrate to this Court that it has established appropriate and sufficient accounting and monitoring procedures to ensure that such funding is devoted exclusively to secular use and that AmeriCorps participants do not receive public funding for the time they spend in religious activity. This injunction applies to all such AmeriCorps EAP grantees as of the date of entry of this Order. It is further

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[1] By definition, this language excludes the separate training and technical assistance grant to the Catholic Network of Volunteer Services, mentioned by the Corporation in its Response and Opposition on page 3.

ORDERED that this Court shall retain continuing jurisdiction to enforce this Order in accordance with its terms.

August 5, 2004

/s/
GLADYS KESSLER
U.S. District Judge

Appendix D

ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT DATED JUNE 1, 2005, DENYING AJC'S PETITION FOR REHEARING EN BANC

No. 04-5317 **September Term, 2004**

Filed On: June 1, 2005

The American Jewish Congress,
Appellee

v.

Corporation for National and Community Service,
Appellant

University of Notre Dame,
Appellee [*sic*]

Consolidated with 04-5318

BEFORE: Ginsburg,* Chief Judge, and Edwards, Sentelle, Henderson, Randolph, Rogers, Tatel, Garland,* and Roberts, Circuit Judges

ORDER

Upon consideration of appellee's petition for rehearing en banc, and the absence of a request by any member of the court for a vote, it is

Appendix D

ORDERED that the petition be denied.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY:

Michael C. McGrail
Deputy Clerk

*Chief Judge Ginsburg and Circuit Judge Garland did not participate in this matter.

Appendix E

STATUTORY AND REGULATORY PROVISIONS

42 U.S.C. § 12634

(a) Prohibited uses

No assistance made available under a grant under this subchapter shall be used to provide religious instruction, conduct worship services, or engage in any form of proselytization.

(b) Political activity

Assistance provided under this subchapter shall not be used by program participants and program staff to –

(1) assist, promote, or deter union organizing; or

(2) finance, directly or indirectly, any activity designed to influence the outcome of an election to Federal office or the outcome of an election to a State or local public office.

(c) Contracts or collective bargaining agreements

A program that receives assistance under this subchapter shall not impair existing contracts for services or collective bargaining agreements.

Appendix E

42 U.S.C. § 12635

§ 12635. Nondiscrimination

(a) In general

(1) Basis

An individual with responsibility for the operation of a project that receives assistance under this subchapter shall not discriminate against a participant in, or member of the staff of, such project on the basis of race, color, national origin, sex, age, or political affiliation of such participant or member, or on the basis of disability, if the participant or member is a qualified individual with a disability.

(2) "Qualified individual with a disability" defined

As used in paragraph (1), the term "qualified individual with a disability" has the meaning given the term in section 12111(8) of this title.

(b) Federal financial assistance

Any assistance provided under this subchapter shall constitute Federal financial assistance for purposes of Title VI of the Civil Rights Act of 1964 (42 U.S.C. 2000d et seq.), Title IX of the Education Amendments of 1972 (20 U.S.C. 1681 et seq.), section 504 of the Rehabilitation Act of 1973 (29 U.S.C. 794), and the Age Discrimination Act of 1975 (42 U.S.C. 6101 et seq.), and shall constitute Federal financial assistance to an education program or activity for purposes of the Education Amendments of 1972 (20 U.S.C. 1681 et seq.).

Appendix E

(c) Religious discrimination

(1) In general

Except as provided in paragraph (2), an individual with responsibility for the operation of a project that receives assistance under this subchapter shall not discriminate on the basis of religion against a participant in such project or a member of the staff of such project who is paid with funds received under this subchapter.

(2) Exception

Paragraph (1) shall not apply to the employment, with assistance provided under this subchapter, of any member of the staff, of a project that receives assistance under this subchapter, who was employed with the organization operating the project on the date the grant under this subchapter was awarded.

(d) Rules and regulations

The Chief Executive Officer shall promulgate rules and regulations to provide for the enforcement of this section that shall include provisions for summary suspension of assistance for not more than 30 days, on an emergency basis, until notice and an opportunity to be heard can be provided.

Appendix E

45 C.F.R. § 2520.30 (2001)

§ 2520.30 Are there any activities that are prohibited?

Yes. Some activities are prohibited altogether. Although all prohibited activities may be performed voluntarily by participants on their own time, they may not be performed by participants in the course of their duties, at the request of program staff, or in a manner that would associate the activities with the AmeriCorps program or the Corporation. These activities include:

(a) Any effort to influence legislation, as prohibited under section 501(c) of the Internal Revenue Code of 1986 (26 U.S.C. 501(c));

(b) Organizing protests, petitions, boycotts, or strikes;

(c) Assisting, promoting or deterring union organizing;

(d) Impairing existing contracts for services or collective bargaining agreements;

(e) Engaging in partisan political activities, or other activities designed to influence the outcome of an election to any public office;

(f) Engaging in religious instruction, conducting worship services, providing instruction as part of a program that includes mandatory religious instruction or worship, constructing or operating facilities devoted to religious instruction or worship, maintaining facilities primarily or inherently devoted to religious instruction or worship, or engaging in any form of religious proselytization;

(g) Providing a direct benefit to –

(1) A business organized for profit;

(2) A labor union;

(3) A partisan political organization;

(4) A nonprofit organization that fails to comply with the restrictions contained in section 501(c) of the Internal Revenue Code of 1986 except that nothing in this section shall be construed to prevent participants from engaging in advocacy activities undertaken at their own initiative; and

(5) An organization engaged in the religious activities described in paragraph (e) of this section, unless Corporation assistance is not used to support those religious activities; and

(h) Such other activities as the Corporation may prohibit.

45 C.F.R. § 2520.30 (2002)

§ 2520.30 What activities are prohibited in AmeriCorps subtitle C programs?

(a) While charging time to the AmeriCorps program, accumulating service or training hours, or otherwise performing activities supported by the AmeriCorps program or the Corporation, staff and members may not engage in the following activities:

Appendix E

(1) Attempting to influence legislation;

(2) Organizing or engaging in protests, petitions, boycotts, or strikes;

(3) Assisting, promoting, or deterring union organizing;

(4) Impairing existing contracts for services or collective bargaining agreements;

(5) Engaging in partisan political activities, or other activities designed to influence the outcome of an election to any public office;

(6) Participating in, or endorsing, events or activities that are likely to include advocacy for or against political parties, political platforms, political candidates, proposed legislation, or elected officials;

(7) Engaging in religious instruction, conducting worship services, providing instruction as part of a program that includes mandatory religious instruction or worship, constructing or operating facilities devoted to religious instruction or worship, maintaining facilities primarily or inherently devoted to religious instruction or worship, or engaging in any form of religious proselytization;

(8) Providing a direct benefit to –

(i) A business organized for profit;

(ii) A labor union;

(iii) A partisan political organization;

(iv) A nonprofit organization that fails to comply with the restrictions contained in section 501(c)(3) of the Internal Revenue Code of 1986 except that nothing in this section shall be construed to prevent participants from engaging in advocacy activities undertaken at their own initiative; and

(v) An organization engaged in the religious activities described in paragraph (g) of this section, unless Corporation assistance is not used to support those religious activities; and

(9) Such other activities as the Corporation may prohibit.

(b) Individuals may exercise their rights as private citizens and may participate in the activities listed above on their initiative, on non-AmeriCorps time, and using non-Corporation funds. Individuals should not wear the AmeriCorps logo while doing so.

No. 05-282

In the Supreme Court of the United States

AMERICAN JEWISH CONGRESS, PETITIONER

v.

CORPORATION FOR NATIONAL AND COMMUNITY SERVICE, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

PAUL D. CLEMENT
Solicitor General
Counsel of Record

PETER D. KEISLER
Assistant Attorney General

ROBERT M. LOEB
LEWIS S. YELIN
Attorneys

Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

QUESTIONS PRESENTED

The AmeriCorps Education Awards program provides a $4725 scholarship to individuals who perform at least 1700 hours of secular public service in programs sponsored by a wide range of organizations. The program also gives sponsoring organizations $400 for each individual who performs public service with that organization to help defray the program's administrative costs. The questions presented are:

1. Whether affording individuals who perform the requisite hours of secular public service by teaching secular subjects in a religious school an equal opportunity to obtain an educational award violates the Establishment Clause because those individuals may make an independent choice to engage in religious instruction or activities on their own time.

2. Whether the Establishment Clause prohibits providing religiously-affiliated sponsoring organizations the same $400 payment provided to all sponsors to help defray the administrative costs of participation in the program, where the money is provided to the institution only as a result of the independent choice of private individuals to select that sponsoring organization and where the payment is significantly less than the actual administrative costs incurred.

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-12a) is reported at 399 F.3d 351. The opinion and order of the district court (Pet. App. 13a-55a) are reported at 323 F. Supp. 2d 44.

JURISDICTION

The court of appeals entered its judgment on March 8, 2005. The court of appeals denied a petition for rehearing on June 1, 2005 (Pet. App. 59a-60a). The petition for a writ of certiorari was filed on August 30, 2005. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. a. Congress enacted the National and Community Service Act of 1990 (Community Service Act), 42 U.S.C. 12501 *et seq.*, to "meet the unmet human, educational, environmental, and public safety needs of the United States" and to "expand educational opportunity by rewarding individuals who participate in national service with an increased ability to pursue higher education." 42 U.S.C. 12501(b)(1) and (3). In the Community Service Act, Congress created the Corporation for National and Community Service (Corporation), 42 U.S.C. 12651, to administer the Act and to oversee a variety of programs, operations, and grants designed to promote service to the public.

An important goal of the Community Service Act is the provision of financial rewards to individuals who participate in national service, which will permit those persons to pursue higher education or job training. 42 U.S.C. 12501(b)(3). One such program is the AmeriCorps Education Awards program. 61 Fed. Reg. 46,628 (1996). That program provides financial awards (currently, $4725) to individuals who have completed 1700 hours of national service over a nine- to twelve-month period in an approved service program. 42 U.S.C. 12593(b)(1), 12602(a)(1) and (b); Pet. App. 3a. Those awards may be used to pay the participant's student loans, college expenses, or job-training expenses.

Under the Education Awards program, the Corporation selects a wide range of sponsors who oversee or administer community service programs at host sites, the work of which will qualify an individual to receive an AmeriCorps education award. Such host sites must undertake public-service activities that address the social,

educational, environmental, or public safety needs of a community, see 42 U.S.C. 12501(a)(1), and "provide[] a direct and demonstrable benefit that is valued by the community," 45 C.F.R. 2522.100(a). Individuals may perform their public service through a wide range of programs, including working in "homeless shelters, health clinics, and schools." C.A. App. 747.

b. Sponsoring organizations must be willing to "engage Americans of all backgrounds as members in community-based service," C.A. App. 1489, and "shall not discriminate on the basis of religion" in selecting individuals to perform public service with them, 42 U.S.C. 12635(c)(1); 45 C.F.R. 2540.210(a). The sponsors are typically state and local governments, Indian tribes, and both secular and religious non-profit organizations.

In determining whether a sponsor is qualified to offer public service opportunities under the Education Awards program, the Corporation does not take into account "the secular or religious nature of the applicants or the proposed host sites." C.A. App. 758. Instead, the Corporation considers the design of the proposed public-service programs, including an assessment of community needs and program performance measures. *Id.* at 1555-1556. The Corporation also considers the organizational capacity of an applicant, including its track record and ability to provide oversight, and the budget and cost-effectiveness of its proposed programs. *Id.* at 1556. Of the 34 current sponsoring organizations, 28 are secular and six are religious entities. *Id.* at 1663. Of the 19,000 individuals who sought education awards during fiscal year 2001, only 2000 chose to perform service under the sponsorship of religious organizations, and only 565 chose to work as teachers in private schools. *Id.* at 1582.

c. Individuals seeking to obtain public-service credit for an education award may not perform certain prohibited activities "[w]hile charging time to the AmeriCorps program, accumulating service or training hours, or otherwise performing activities supported by the AmeriCorps program or the Corporation." 45 C.F.R. 2520.30(a). The prohibited activities include "[e]ngaging in religious instruction, conducting worship services, providing instruction as part of a program that includes mandatory religious instruction or worship, * * * or engaging in any form of religious proselytization." 45 C.F.R. 2520.30(a)(7). The individuals are, however, permitted to "participate in the [listed prohibited activities] on their initiative, on non-AmeriCorps time, and using non-Corporation funds. Individuals should not wear the AmeriCorps logo while doing so." 45 C.F.R. 2520.30(b).

Individuals seeking to earn an educational award must record their service hours on timesheets. Since 2001, the Corporation has required individuals who perform their service hours as teachers in religious schools to certify that none of their reported service hours "include[s] any religious instruction, worship, or proselytization." C.A. App. 754, 874. The Corporation also requires participants serving as teachers in religious schools to document on their timesheets the specific activities for which they are claiming service hours in fulfillment of their 1700-hour service commitment. *Id.* at 1203.

In addition, sponsors must document the hours of service performed by individuals that are credited to the AmeriCorps program and to enforce the rules against prohibited activities. C.A. App. 1505. Sponsors themselves must execute a set of "Assurances and Certifications" undertaking, among other things, to "ensure that

no assistance made available by the Corporation will be used to support" religious or other prohibited activities. *Id.* at 753, 866. Sponsors also must enter into "site agreements" with their host sites to ensure that all program requirements and grant provisions are followed. *Id.* at 754, 1493. And sponsors must enter into "member contracts" with the individuals working with them that preclude each individual from claiming service credit for prohibited activities. *Id.* at 753, 1493. Finally, sponsors must provide participants with a formal orientation that includes an explanation of prohibited activities. *Ibid.*

d. Because the sponsors are responsible for recruiting and training individuals to participate in their service programs and for supervising and documenting the service hours that render individuals eligible for an education award, the Corporation provides each sponsor a "fixed amount grant" of $400 for each individual that participates in the Education Awards program through that sponsor. C.A. App. 1562. In actuality, "the reasonable and necessary costs inherent in carrying out the program significantly exceed the amount of assistance provided by the Corporation." *Id.* at 748, 1562; Pet. App. 12a. The statute forbids the sponsor from using the $400 grant for sectarian purposes, *ibid.*; 42 U.S.C. 12634(a); 45 C.F.R. 2540.100(b), but does not otherwise require sponsors to document their use of the administrative payment.

e. To monitor compliance directly, the Corporation conducts both random and targeted site visits each year, including annual visits to between five and ten sponsors and to thirty or more host sites. C.A. App. 754-755. If the host site is a school, the Corporation interviews individual participants and supervisors to determine "the courses taught by each participant to accumulate Ameri-

Corps service hours." *Id.* at 755-756. The Corporation also assigns program officers to supervise each sponsor, requires each sponsor to submit annual progress reports, and reviews compliance and other program operation issues with each sponsor at least monthly. *Id.* at 757.

2. a. Asserting taxpayer standing, Pet. App. 4a, petitioner filed suit seeking to enjoin the Corporation from both crediting the secular public service hours performed by individuals with religiously affiliated sponsoring organizations and providing such sponsors the $400 grant to defray their administrative expenses, *id.* at 3a. The University of Notre Dame, one of six religiously-affiliated program sponsors, intervened in the case in defense of the program.

The district court granted summary judgment to petitioner. Pet. App. 13a-55a. The court held that the Education Awards program was not neutral, for Establishment Clause purposes, because (i) the criteria used to select sponsors involve an element of "discretion[]," *id.* at 43a; (ii) participating individuals generally must choose from among pre-approved sponsors, *id.* at 45a, and (iii) the program has an "impermissible content" when the participating individual engages in instruction in a religious school, *id.* at 47a. The district court also held that *Committee for Public Education & Religious Liberty* v. *Nyquist*, 413 U.S. 756 (1973), categorically prohibits any direct payment of money to any religiously affiliated organization absent extensive monitoring procedures and account segregation to ensure that the money is used for exclusively secular purposes. Pet. App. 51a-53a. The court then enjoined the Corporation from providing both educational awards to individuals who serve as teachers in private sectarian schools and

$400 grants for administrative costs to religiously affiliated sponsoring organizations.

b. The court of appeals reversed. Pet. App. 1a-12a. The court held that the Education Awards program does not violate the Establishment Clause by failing to prohibit participants from teaching religion on their own time, and that the $400 grant was a permissible partial reimbursement for the costs of administering the program. The court determined that this Court's line of precedents "upholding programs of true private choice * * * control this case." *Id.* at 6a-7a (citing, *inter alia*, *Zelman* v. *Simmons-Harris*, 536 U.S. 639 (2002)). The court concluded that the Education Awards program qualifies as a program of private choice, because the awards are available "to a broad class of citizens," chosen without regard to religion, "the AmeriCorps program creates no incentives for participants to teach religion," Pet. App. 7a, and participants who choose to teach at religious schools "do so only as a result of their own genuine and independent choice," *ibid.* (quotation marks omitted). The court further noted that individuals "may count only the time they spend engaged in non-religious activities toward their service hours requirement." *Ibid.*[1]

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[1] The court acknowledged that petitioner had submitted evidence suggesting that, since 1999, four participants might have improperly counted time spent teaching religion toward their service hours requirement, and that the government disputed that evidence. Pet. App. 10a. The court concluded, however, that, "[e]ven if we credited [petitioner's] version, it proves nothing of significance." *Ibid.* In the court's view, such *de minimis* evidence of diversion failed to establish that the program as a whole "is giving participants Education Awards for hours they spend teaching religion." *Id.* at 11a.